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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND STATUTES CITED AND CONSTRUED AND AN INDEX.

By SIDNEY R. MOON,

OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Asst. Reporter.

LEE W. MOON, Second Asst. Reporter.

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JUDGES

OF THE

SUPREME COURT.

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. TIMOTHY E. HOWARD.* ‡

HON. LEONARD J. HACKNEY.† ‡

HON. SILAS D. COFFEY.‖

HON. JOSEPH S. DAILEY.§

HON. JAMES McCABE.‡

* Chief Justice at November Term, 1893.

† Chief Justice at May Term, 1894.

‡ Term of office commenced January 1, 1893.

§ Appointed July 25, 1893, to succeed Hon. Walter Olds.

‖ Term of office commenced January 7, 1889.

OFFICERS

OF THE

SUPREME COURT

CLERK,

ANDREW M. SWEENEY.

SHERIFF,

DAVID A. ROACH.

LIBRARIAN,

JOHN C. McNUTT.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1893, IN THE SEVENTY-EIGHTH YEAR OF THE STATE.

No. 16,840.

BUNCH ET AL. *v.* HART ET AL.

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145 269

138 1
155 180

138 1
159 241

138 1
160 113

SPECIAL FINDING.—*Omission of Material Fact.—Remedy.—Practice.*—Where a special finding omits material facts, the remedy is by a motion for a new trial and not by a motion to modify.

FRAUDULENT CONVEYANCE.—*Husband and Wife.*—A husband who has paid out money for the betterment of his wife's real estate, and who, for the purpose of defrauding her creditors, joins her in making conveyances whereby the title is placed in himself and wife by entireties, can assert no claim thereon as against the creditors sought to be defrauded.

Appeal from the Henry Circuit Court.

T. B. Redding, *C. N. Mikels* and *M. E. Forkner*, for appellants.

J. Brown, *W. A. Brown* and *J. M. Morris*, for appellees.

DAILEY, J.—This was an action by appellees, Edgar L. Hart, Frank W. Hart and Abraham Van Tuyl, against Sarah J. Bunch, George W. Bunch, Alice C. Williams and Loring A. Williams, to set aside a conveyance of certain real estate described in the complaint, made by

appellees Bunch and Bunch, who were husband and wife, to said Alice C. Williams, and by her transferred, by warranty deed, to said Sarah J. and George W. Bunch, as tenants by entireties, on the alleged ground that the conveyances were fraudulent as against said Sarah J. Bunch's creditors.

A demurrer was filed separately by each of the defendants to this complaint, and overruled by the court.

The defendants Williams and Williams answered disclaiming any interest in the matter in controversy. Bunch and wife answered by general denial.

The case was submitted to the court for trial with a request by both parties to state its finding of facts and its conclusion of law upon the facts as found. The court made a special finding of facts. The appellants then filed a motion to modify the special finding, asking that the court specially find certain facts therein named, but the court overruled the motion and refused to make any further finding or modify the finding in said cause, to which the appellants excepted, and thereupon the court stated its conclusion of law upon the special finding, and rendered judgment thereon. At the proper time, appellants filed a motion for a new trial, which the court overruled. The rulings of the court, as above set forth, are assigned for error.

The facts in the case, as shown by the evidence, are substantially these: The father of Sarah J. Bunch traded a farm to one Leander P. Mitchell for the real estate in controversy and other property, and caused the deed therefor to be executed to her. She was then engaged in the millinery business, and continued therein until after the transfer complained of. During the time she held this property, it was improved at an expense of about $1,500, of which George W. Bunch paid $500, and she furnished $1,000, and the husband contends

that he expended for her further sums of money. While Sarah J. Bunch held the title to the premises in controversy, the debts due the appellees, which they seek to recover, were contracted.

By reason of the fact that the evidence shows the payment by George W. Bunch of $500 in the improvement of the property, besides his own work on the same, appellants contend that such fact should have been noticed in the special finding, and placed therein, and being omitted therefrom, it was reversible error for the court to refuse to modify its special finding so as to include these facts.

The grounds urged for a new trial rest upon the proposition to modify the special finding so as to embrace these facts; also, that there is no evidence to sustain the finding that George W. Bunch reconstructed and repaired the house on lot 8, at an expense of $1,000, out of their joint earnings, therefore the special finding is not sustained by sufficient evidence.

In our opinion, the motion to modify the findings was correctly overruled, because there is no authority for such practice.

In Elliott's App. Proced., section 757, and numerous cases there cited, the rule is stated as follows: "If the finding of facts is defective or imperfect it is to be challenged in substantially the same manner as a special verdict. If the finding of facts is silent as to a material point, as to that point it is to be deemed to be adverse to the party upon whom the burden of proof rests. * * If facts are not found which were established by the evidence the proper remedy is a motion for a new trial. * * The finding of facts can not be successfully attacked by a motion to strike out where the ground is that the finding is contrary to the evidence. The evidentiary facts are not to be stated, but the inferential or ultimate facts must be

properly stated. The presumption, in the absence of a countervailing showing, is that all the material facts proved are stated in the special finding. Facts, not mere conclusions, should be stated. The finding must state the facts with reasonable certainty."

"Until the contrary appears from the evidence, it must be assumed that all the facts established by the evidence are contained in the finding. It is, therefore, incumbent upon a party who assails the judgment upon the ground that it does not state the facts proved, to make his assertion good by the evidence." *Hays, Admr.*, v. *Hostetter*, 125 Ind. 60 (65).

In section 758, the rule is declared that "a *venire facias de novo* is grantable when the verdict, whether general or special, is imperfect by reason of some uncertainty, or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages," and, in section 759, the author says: "It seems necessarily to result from this established rule that a failure to find upon all the issues is not a ground upon which a *venire de novo* can be successfully claimed." "The remedy where the facts established by the evidence are not found is by a motion for a new trial, * * * a motion for a *venire de novo* is often the appropriate mode of questioning the sufficiency of a special verdict."

The material facts in this case, under the issues formed, are: 1st. Did Sarah J. Bunch own the property described in the complaint? 2d. Did she make, through a trustee, a conveyance of the property to herself and her husband, to be held by them as an entirety? 3d. Did she become indebted, at the time she owned the property, to the plaintiffs and other creditors? 4th. Did she make the transfer to hinder, delay or defraud her creditors, including the plaintiffs? 5th. Did the grantees have knowledge of such intent? 6th. Did she, at the

time of said conveyance, or at any time subsequent thereto, up to the time of bringing this action, have sufficient other property with which to pay the plaintiffs their claims?

The above facts should all be found in the special finding in a case of this character, and when the unmixed and ultimate facts are so found the special finding has then performed its office, and the request has been complied with. A special finding should not be encumbered with a long dissertation or comments on the evidence, nor descend into the particulars of the evidence, and report evidential facts, or scraps or fragments of evidence. If the court fails to find the material facts involved in the issue, it has failed to make a special finding, and the remedy, as suggested, is by a motion for a new trial. In our opinion it makes little difference whether the joint earnings of the husband contributed to the betterment of the property as found by the court, or whether each furnished means singly for the purpose while she was its legal owner. The result would be the same in this case in either instance. It is true, as contended by appellants' counsel, there is no law to prevent a wife securing her husband what she owes him, if done in good faith. But the *bona fides* of the transaction was a question for the court under the evidence, and if there was testimony tending to establish, or from which the court could have fairly drawn the inference of fraud, this court will not disturb the special finding. The evidence shows that the real estate in litigation is reasonably worth $2,500 or $3,000. The husband claims he has paid, either directly to his wife or on outstanding debts, during the time she was carrying on the millinery business, from 1881 to 1889, about $6,372. The money she received, and the goods she bought, evidenced by her outstanding debts, saying nothing of the profits, as we judge from the record,

would place from $6,000 to probably $8,000 more in her hands during this period, not taking into consideration money paid by her on accounts. The query is, what became of all this money?

In appellants' *supersedeas* brief, which is referred to by appellants as a part of her brief in this cause, there is contained an affidavit in which she and her husband both swear that they are without property, and unable to give a greater *supersedeas* bond than $200. A part of her father's farm, in Wayne county, came to her about the time she went into business, but it does not appear what became of it. On the trial she was asked as to the condition of her property, and she exhibited a list making her then worth $6,400, but upon cross-examination the entire list vanished, and her whole estate disappeared. It seems the husband had long known that an estate by entireties placed the property beyond the reach of the creditors of both the grantees, and he so testified on the trial.

For the last twelve or fifteen years George W. Bunch has been doing business in his wife's name, and has not been worth a dollar except as he has traded around, using property held as a jointure by himself and wife. There are other circumstances connected with this case from which the court might have inferred that the transactions assailed were honeycombed with fraud, such as the assignment of mortgages by the father-in-law to George W. Bunch and the release thereof, whenever their continued existence would obstruct or in any manner interfere with his business, but neither ever incumbered the records with any assignment or release. As heretofore shown, the court found that the joint earnings of the husband and wife contributed to the improvement of the wife's property, but it does not necessarily follow from this fact that the conveyance was not fraudulent.

This alone creates no claim against either the wife or her property.

In *Lane* v. *Taylor*, 40 Ind. 495, it is said: "Washburn, in his work on real estate, states the law thus: 'If the husband expend money upon the lands of his wife in his occupation, by erecting buildings or making improvements thereon, the law will presume he intended it for her benefit, and he can not recover for the same.' 1 Washb. Real Prop., 281, section 20." And on page 501 is this language: "A husband had no valid or legal claim for the improvement made while his wife owned or occupied the premises."

If, as found by the court below, the conveyance was made by Sarah J. and George W. Bunch to themselves, to be held by entireties, for the purpose of cheating, hindering and delaying the creditors of Mrs. Bunch in the collection of their debts, it is unimportant whether the husband had paid money for, and held claims against, the wife amounting to a consideration for the conveyance from her to themselves jointly.

In *Bishop* v. *Redmond*, 83 Ind. 157, the rule is stated that "where a grantee takes a conveyance for the purpose of aiding the grantor in defrauding his creditors, the fact that he pays a valuable consideration does not divest the conveyance of its fraudulent character."

In *Harrison* v. *Jaquess*, 29 Ind. 208, it is said: "Where the person receiving a fraudulent transfer participates in the fraud, it can make no difference whether any consideration was paid for the transfer."

In all such transactions it is a well settled rule of the courts that "the fraudulent vendee of a failing debtor is not entitled to receive, out of the property, money paid by him in such transaction, even where it has gone to *bona fide* creditors, as the law will leave the parties who have been convicted of the fraud where it finds them."

Seivers v. *Dickover*, 101 Ind. 495. We think there is no error in the record. Judgment affirmed.

Filed May 10, 1894.

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No. 16,662.

PENNINGTON *v.* PENNINGTON.

SPECIAL FINDING.—*Sufficiency of Evidence.*—*Supreme Court Practice.*—If the finding of the court is supported by some evidence, the appellate tribunal will not disturb it.

NEW TRIAL.—*Error in Calculation of Amount Due.*—Where it appears from the findings that erroneous calculations of the sums found owing from the parties, each to the other, were made, such error is sufficient ground for a new trial.

From the Boone Circuit Court.

S. M. Ralston, *M. Keefe* and *H. C. Wills*, for appellant.

HACKNEY, J.—This was a suit by the appellant to enforce a vendor's lien for the balance of the unpaid purchase price of twenty acres of land sold by the appellant to his son, James W. Pennington. The appellee is the widow of said James, and it was alleged, and the court found, that she held the land, as a volunteer, by indirect conveyance from her husband. Upon the issues formed, the trial court rendered a special finding of facts, and stated its conclusions of law therefrom, and upon such finding and conclusions entered its decree in favor of the appellant for the sum of two hundred and six dollars and eighty-three cents.

One contention in this court is that the amount of said finding is insufficient; first, because the court found the agreed consideration for the sale to have been eight hundred dollars, when, as insisted, the preponderance

of the evidence showed it to have been nine hundred dollars; and, second, because of erroneous calculations of the sums found owing from the parties, each to the other. Upon the first contention it is conceded that some evidence supports the view of the court, and, with this concession, under the admitted rule, we can not weigh the evidence. As to the second contention we are unable to escape the conclusion that the trial court's conclusions were more favorable to the appellee than were warranted by the facts found. We learn from the special findings that in September, 1885, the appellant was indebted to one Brown in the sum of six hundred dollars, which was secured by a mortgage on the lands in suit and other lands, said sum bearing interest at the rate of eight per centum per annum, and that he was indebted also to his said son James in the sum of three hundred dollars upon a settlement of that date. On that day James purchased the twenty acre tract, agreeing to pay therefor the sum of eight hundred dollars, said three hundred dollars to be then applied as a credit upon said purchase price; and it was further agreed that the balance of five hundred dollars should be paid by James in assuming that amount of his father's said indebtedness to Brown, with the interest thereon. Thereafter, and from year to year until in January, 1891, James paid, in installments, the whole interest upon said indebtedness to Brown, aggregating the sum of two hundred and forty dollars, or forty dollars more than the interest upon the five hundred dollars so assumed by him. At that time a loan was procured from the Ætna Life Insurance Company, in the sum of six hundred dollars, secured by the obligations of the appellant, and with said sum the indebtedness to Brown was paid by the appellant. In negotiating said loan the said James incurred and paid an indebtedness of thirty dollars for commissions, but it

is not found that the same were incurred or paid with the knowledge or consent or at the instance of the appellant. It was then agreed between said appellant and James that the remaining unpaid purchase-money owing from the latter should be paid by him upon the new loan, with the interest thereon. It is further found that after said purchase, and up to June, 1891, the son did work for his father to the value of one hundred and fifty dollars, and that during said period the father supplied him pasture for large numbers of live stock, the value of which is not found. Upon these facts the court charged appellant with:

Interest paid Brown	$240 00
Interest on the same	30 00
Work done	150 00
Interest on the same	28 87
Interest on said commission paid	1 80
Total charges	$450 67

And gave him credit as follows:

Balance on purchase-money	$500 00
Interest on same at six per cent. from September, 1885	157 50
Total credits	$657 50
Balance for which decree was given	$206 83

The trial below was concluded on the 9th day of December, 1891, or six years, two months and nine days after the sale. If the court's theory was correct, and the appellant was entitled to credit for but six per centum as interest upon said balance of purchase-money, it will be seen that, instead of $157.50, the sum of said interest was $185.75, or $28.25 more than allowed. But by what view of the findings it was proper to charge James

with less than eight per centum, at least until in January, 1891, when the new loan was secured, we are unable to conceive, since he agreed to pay five hundred dollars of the Brown debt with the interest thereon. The interest on the new loan is not found, and we are unable to estimate it. The difference between six and eight per centum from September, 1885, and January, 1891, is $52.50 on the five hundred dollars. These two items clearly illustrate the error into which the court has fallen, and it will not be necessary for us to more than refer to the error in charging the appellant with interest on the commission when the commission itself was not charged nor chargeable to the appellant. Other items we do not consider.

The finding of the court is manifestly too small, and the exceptions to the conclusions of law are sustained, and the motion for a new trial should have been granted.

The judgment of the circuit court is reversed, with instructions to grant a new trial.

Filed May 9, 1894.

No. 17,276.

Davis *v.* The State.

Surety of the Peace.—*Sufficiency of Affidavit.—Fear of Personal Injury.*—An affidavit for surety of the peace, of the following tenor, is sufficient: A, being duly sworn, on his oath says that he has just cause to fear, and does fear, that B will kill and murder him, and that he makes this affidavit only to secure the protection of the law, and not from anger or malice.

Same.—*Affidavit Sworn to Before Notary Public.*—An affidavit for surety of the peace may be sworn to before a notary public.

Same.—*A Criminal Action.—Nature of.—Preponderance of Evidence.*—While a prosecution for surety of the peace is a criminal action, yet

it is simply for the prevention of crime, the only question to be decided being whether the prosecuting witness has just cause to entertain the fears expressed in his affidavit, which is to be decided by the preponderance of the evidence.

SAME.—*Reasonable Doubt.—Province of Jury.*—The doctrine of reasonable doubt has no place in such an action, nor is the jury the judge of the law.

SAME.—*Procedure.—Failure of Defendant to Testify.—Instruction to Jury.*—In such case, the following instruction was correctly refused: "This case is governed by the law governing criminal cases, except where the law provides otherwise. If the defendant did not testify in his own behalf, you can not take this fact into consideration, nor talk about it in the jury room."

SAME.—*Evidence of Communication of Threats.*—It was not error to permit the complaining witness to testify that certain persons told him, in the absence of the defendant, that the defendant threatened to kill him and to do him other injuries, where the evidence is not in the record; for it must be presumed that the threats were also proved.

SAME.—*Misconduct of Counsel.—Argument to Jury.*—Where, in his argument to the jury, the State's attorney said the following: "Gentlemen of the jury—The defendant did not go on the witness stand and testify in this case. He knew we had his neighbors in the court, and that we would impeach him if he did testify." Also, "If * * the complaining witness did swear to a lie, as Mr. ——— says he did, why did the defendant not call his neighbors, who are here in court?" And, also, "We have an illustration of permitting cranks to run at large, in the killing of Carter Harrison, the mayor of Chicago, the most outrageous murder of our time. Had the murderer been placed under bonds, that murder would not have occurred." Such remarks were beyond the bounds of legitimate argument, and being sanctioned by the court, amount to reversible error.

From the Huntington Circuit Court.

B. F. Ibach and *W. A. Mitchell*, for appellant.

A. G. Smith, Attorney-General, *S. E. Cook*, *C. W. Watkins*, *F. W. Cady* and *D. L. Cady*, for State.

HOWARD, C. J.—This was a prosecution for surety of the peace, based on the following affidavit:

"Joseph Taylor, being duly sworn, on his oath says that he has just cause to fear, and does fear, that said Joseph B. Davis will kill and murder him, and that he

makes this affidavit only to secure the protection of the law, and not from anger or malice."

We think this affidavit is drawn in substantial compliance with the provisions of section 1675, R. S. 1894 (section 1606, R. S. 1881).

The statute provides that the fear complained of by one bringing the suit shall be "that another will destroy or injure his property, or injure, by violence, himself or some member of his family or his ward."

The fear complained of here is that the appellant "will kill and murder" the complaining witness; this is certainly a complaint of fear of injury to himself by violence.

It is also claimed as error that the affidavit was sworn to before a notary public, whereas the statute, *supra*, provides that it shall be made before a justice of the peace.

By section 8039, R. S. 1894 (section 5964, R. S. 1881), a notary is given power "to administer oaths generally, and to take and certify affidavits and depositions."

Like authority is given in section 8086, R. S. 1894 (section 6010, R. S. 1881).

In *State, ex rel.*, v. *Maners*, 16 Ind. 175, this court held that: "A prosecution for surety of the peace is a criminal prosecution. 4 Blacks. Comm., 251; *State, ex rel.*, v. *Abrams*, 4 Blackf. 440. The practice, therefore, in criminal cases governs, where the act authorizing such prosecutions is silent upon a point of practice under it."

And in *Hunter* v. *State*, 102 Ind. 428, it was held that, under the statutes above cited, an affidavit filed before a justice of the peace, charging a crime, may be sworn to before a notary public. It follows that an affidavit for surety of the peace may also be sworn to before a notary public.

The ruling of the court in refusing to give the following instruction is complained of:

"This case is governed by the law governing criminal cases, except where the law provides otherwise. If the defendant did not testify in his own behalf, you can not take this fact into consideration nor talk about it in the jury room."

This instruction the court refused to give on the ground that section 1867, R. S. 1894 (section 1798, R. S. 1881), did not apply to surety of the peace cases.

It is true that prosecutions to obtain surety of the peace are criminal prosecutions. *State, ex rel.*, v. *Abrams, supra*; *State, ex rel.*, v. *Maners, supra*; *Murray* v. *State*, 26 Ind. 141; *State* v. *Vankirk*, 27 Ind. 121; *Deloohery* v. *State*, 27 Ind. 521; *Fisher* v. *Hamilton*, 49 Ind. 341; *State* v. *Carey*, 66 Ind. 72.

But while such proceedings are criminal prosecutions, they are not prosecutions for the punishment, but for the prevention of crime. The question to be decided is not whether the defendant is guilty of any crime, but whether the complaining witness has just cause to entertain the fears expressed in his affidavit. This issue is to be decided by the preponderance of the evidence. The doctrine of reasonable doubt has no place, nor is the jury the judge of the law, as in criminal cases.

The only question to be decided is to be decided, as in civil cases, by the weight of the evidence. *Murray* v. *State*, *supra*; *Arnold* v. *State*, 92 Ind. 187; *Stone* v. *State*, *ex rel.*, 97 Ind. 345.

The evidence in the case being treated, therefore, as in civil cases, and the instruction requested being such as is applicable alone to criminal cases, we think the ruling of the court in refusing to give the instruction can not be held erroneous.

It is claimed as error that the court permitted the complaining witness to testify that certain persons told him, in the absence of the defendant, that the defend-

ant threatened to kill him and to do him other injuries. This was objected to as hearsay evidence. It is proper to prove threats made against the complaining witness by the defendant, and that such threats were communicated to the complaining witness. The evidence is not in the record, and we are unable to say whether the threats here complained of were proved on the trial as made by the defendant, or not. If it was proved on the trial that such threats were made by the defendant, then it would be not only proper but necessary to prove that the knowledge of the threats was communicated to the complaining witness. It is the threat and the communication of that threat to the complaining witness that puts him in the fear of which he complains. Presuming, as we must in the absence of the evidence, that the court did its duty, we must take it for granted that the court only allowed the evidence as to the communication of the threats on the ground that the threats themselves were also proved. On that ground the admission of the evidence complained of was correct.

It is complained that in the argument to the jury the attorney for the State made the following statements:

"Gentlemen of the jury, the defendant did not go on the witness stand and testify in this cause. He knew we had his neighbors in the court, and that we would impeach him if he did testify."

And the following:

"Gentlemen of the jury, if Joseph Taylor, the complaining witness, did swear to a lie, as Mr. Ibach says he did, why did the defendant not call his neighbors, who are here in court?"

And, also, these words:

"Gentlemen of the jury, we have an illustration of permitting cranks to run at large, in the killing of Carter Harrison, the mayor of Chicago, the most outrageous

murder of our time. Had the murderer been placed under bonds, that murder would not have occurred."

And it is further claimed that the court erred in stating, in the presence of the jury, that the counsel for the State had a right to comment on the fact that the defendant did not offer himself as a witness in the case, and also had a right to make the remarks about calling the neighbors of the complaining witness to impeach his evidence, as legitimate and proper argument in the case.

It is true, as said in *City of Lafayette* v. *Weaver*, 92 Ind. 477, that "There must be a plain case of violation of the privilege of argument, which has not been sufficiently counteracted by the trial court, and such misconduct as can be said by this court to have been injurious to the objecting party, to justify us in reversing the action of the trial court in overruling a motion for a new trial based upon such a departure of counsel."

In this case, the misconduct in argument, if it were such, was not counteracted by the trial court; but, on the contrary, the court said, in the presence of the jury, that counsel had a right to make the remarks complained of.

As to whether the remarks were probably injurious to the objecting party, it is clear that their purpose was to discredit the defendant in the eyes of the jury. The fact that the jurors were told that the witnesses were present in court who would have impeached the defendant if he had gone upon the witness stand, and intimating that he did not dare to call those witnesses, his own neighbors, to his defense, although they were present in court, must certainly have tended to impress the jury with the weakness of the defense. Then the allusion to the assassination of the mayor of Chicago, at that time fresh in the minds of the people, could hardly help but inflame the minds of the jury. The death of Carter Harrison

was not then a historical event upon which the minds of the jury might rest without emotion. It was as yet in the realm of the newspapers and the deliberations of courts and juries. The indignation of the people was even rising rather than subsiding.

The comments upon evidence that might have been, but was not, given by witnesses, neighbors of defendant, who, the jury were told, were sitting uncalled in court, were particularly objectionable. It is the business of an attorney to comment upon the evidence which has been given, not upon that which might have been given.

It was said by the lamented Mitchell, in the case of *Bessette* v. *State*, 101 Ind. 85, that "it may sometimes happen, as for aught we know was the case in this instance, that in his zeal to do his duty the bounds of propriety may be unwittingly overstepped by a * * * prosecutor, and while it would be a most ungracious task for this court to say anything which would in any degree suppress the highest enthusiasm of forensic effort in behalf of the State, or in any case at the bar, it should be remembered that fair, open debate, rather than a resort to questionable expedients, will best subserve the ends of justice. To arrive at the exact truth and justice of the case according to the facts and the law should be the aim of all forensic strife, and to this end the utmost power of logical reasoning and deduction or proper illustration may be employed. To master and put them under contribution are the marks of the accomplished advocate."

We can not avoid the conviction that the appellant's case was unfairly presented to the jury, and that in the interests of justice he should have a new trial.

The judgment is reversed, with instructions to grant a new trial.

Filed May 17, 1894.

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No. 16,336.

The Ohio and Mississippi Railway Company *v.* Dunn.

Instructions to Jury.—*Filing.*—*Bill of Exceptions.*—Instructions which are brought into the record by a general bill of exceptions are only required to be filed in and as a part of such bill.

Master and Servant.—*Railroad.*—*Incompetent Employe.*—*Negligence.*—*Injury to Fellow-Servant.*—The fact that a fireman, who has occasionally served as engineer in a switch yard, is placed in charge of an engine to do switching, is not sufficient in itself to charge the railroad company with negligence, in an action by a fellow-servant to recover for an injury alleged to have been sustained by reason of the incompetence of such person.

Same.—*Employment of Servant.*—*Knowledge as to Fitness.*—In an action by a servant to recover for an injury alleged to have been caused by the negligence of a fellow-servant, the fact that the latter had been employed only a few hours prior to the injury and that he had been secured from the same branch of service of another company without inquiry as to his fitness, is not in itself sufficient to charge the defendant company with negligence.

Same.—*When Case May be Withdrawn From Jury.*—It is the duty of the trial court to take the case from the jury, upon proper request, when any element essential to the finding of the fact in issue has not been proved, or when there is no evidence from which, when undisputed, the jury would be justified in concluding that such fact exists.

From the Floyd Circuit Court.

E. Barton, *C. L. Jewett*, *H. E. Jewett*, *W. M. Ramsey*, *L. Maxwell* and *R. Ramsey*, for appellant.

J. P. Kelso and *C. D. Kelso*, for appellee.

Hackney, J.—The appellee sued the appellant to recover for personal injuries sustained while coupling cars in making up a train of freight cars in the appellant's switch yards. The complaint places the right of recovery upon three distinct grounds, namely: The negligence of an unskilled engineer, the negligence of an unskilled associate switchman, and maintaining a coupling link so out of repair that it could not be raised

and adjusted to the head of the opposite draw bar. A general verdict for the plaintiff constitutes the only finding, and the motion for a new trial presents the only questions urged in this court. The principal questions before us are upon the instructions given and refused, and as appellee insists that such instructions are not in the record in a manner to present them for consideration, we will first pass upon this objection. It is urged that though appearing in the bill of exceptions, with a general exception reserved to the giving of each charge given, and to the refusal of each instruction asked, and the bill showing that those asked were submitted at the conclusion of the evidence with a proper request that they be given, they are not in the record for the reason that it does not appear that such instructions asked and charges given were filed in the circuit court. Under the code and the recognized practice of this State, there are three methods of making instructions a part of the record; first, by an order of court; second, by special exceptions written upon the margin or following each instruction and signed by the judge; and third, by a general bill of exceptions. In the first and second methods the instructions receive identification from the filing required by the code. Sections 533 and 535, R. S. 1881. *O'Donald* v. *Constant*, 82 Ind. 212; *Supreme Lodge, etc.*, v. *Johnson*, 78 Ind. 110; *Elliott* v. *Russell*, 92 Ind. 526; *Hadley* v. *Atkinson*, 84 Ind. 64; *Burk* v. *Andis*, 98 Ind. 59; *Eslinger* v. *East*, 100 Ind. 434; *Graeter* v. *State*, 105 Ind. 271; *Ft. Wayne, etc., R. W. Co.* v. *Beyerle*, 110 Ind. 100; *Louisville, etc., R. W. Co.* v. *Wright*, 115 Ind. 378; *Landwerlen* v. *Wheeler*, 106 Ind. 523; *Olds* v. *Deckman*, 98 Ind. 162; *Blount* v. *Rick*, 107 Ind. 238; *Lower* v. *Franks*, 115 Ind. 334. In compliance with those sections of the statute the instructions are

filed "as a part of the record," and by such means become "a part of the record."

In no one of the cases cited, and in no other that has fallen under our observation, has it been held that instructions may not be carried into the record by a bill of exceptions properly made, tendered, signed and filed, as required by section 629, R. S. 1881.

This section relates to all matters not otherwise properly made a part of the record, and when complied with, it is expressly provided that they "shall be a part of the record."

In some of the cases above cited the decisions are made with express reference to sections 533 and 535, *supra*, while in others the distinction is not made to appear.

The case of *Enslinger* v. *East*, *supra*, is one of the latter class, and the case of *Graeter* v. *State*, *supra*, states the erroneous citation of section 1849, R. S. 1881, in *Enslinger* v. *East*, *supra*, and cites, instead, section 329, R. S. 1881.

With this light upon the case of *Enslinger* v. *East*, *supra*, it is plain that the filing there referred to was that required by the last cited section of the statute which relates to the presentation and filing of the instructions in and as a part of the bill of exceptions.

In *Burk* v. *Andis*, *supra*, it was held that instructions in a formal bill of exceptions, signed by the judge and thus made a part of the record, were before this court.

In *Hadley* v. *Atkinson*, *supra*, it was clearly intimated that this method of making instructions a part of the record was sufficient.

No one of the methods suggested for bringing the instructions into the record is exclusive of the other methods. *Plank* v. *Jackson*, 128 Ind. 424; Elliott's App. Proced., section 792, and authorities cited.

We conclude, therefore, that the instructions in the transcript are properly a part of the record.

The first negligence alleged was in placing the engine in charge of a fireman who was inexperienced and incompetent for such service. The injury to the appellee's hand was alleged to have been sustained in having it caught and held between the drawbars of the foremost of several cars being pushed by the engine, and the car desired to be coupled into the train. The omission of duty alleged against the engineer was that he "did not slow up said train as it approached and struck the said car plaintiff was attempting to couple, but caused it to back more after he was notified to stop the same," and until it struck other cars standing on the track.

There is no question but that the appellee and the engineer were fellow-servants. The burden, therefore, rested upon the appellee, as to this element of the case, to establish, by a preponderance of the evidence, that the engineer was incompetent; that the injuries were caused or aggravated by the incompetency of the engineer; the absence of contributory negligence and of knowledge of such incompetency, as well as the presence of knowledge by the company of such incompetency. See *Evansville, etc., R. R. Co.* v. *Duel*, 134 Ind. 156.

The appellant's first contention is that the evidence does not establish either that the engineer was unskillful or that the injury complained of was due to any lack of skill on the part of the engineer. It is conceded that one Coy was in charge of the engine, as engineer, at the time of the occurrence; that he had not been regularly engaged as an engineer, but had been engaged as a locomotive fireman, and while he had never run a locomotive in a regular way upon the road, he had done so on extra occasions, in the switch yard, during the year of his service while Dunn was a switchman.

It further appears that firemen are often qualified to serve as engineers before they become regular engineers. These are the facts shown by the evidence, and constitute the summary of the evidence made by appellee's counsel in their brief. Considering alone the question of Coy's competency to serve as an engineer in the work in which he was engaged at the time he was placed in charge of the locomotives, we have no testimony in addition to the facts above stated. Are such facts sufficient to charge the appellant with negligence in placing Coy in charge of the engine?

It was said by this court in *Louisville, etc., R. W. Co.* v. *Sandford, Admx.*, 117 Ind. 265, that "all the authorities agree that negligence on the part of the employer is not to be presumed, and that it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence. *Riest* v. *City of Goshen*, 42 Ind. 339; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind. 212; *Summerhays* v. *Kansas Pacific R. W. Co.*, 2 Col. 484; *Mobile, etc., R. R. Co.* v. *Thomas*, 42 Ala. 672; *State* v. *Philadelphia, etc., R. R. Co.*, 60 Md. 555; *Davis* v. *Detroit, etc., R. R. Co.*, 20 Mich. 105; *The Gladiolus*, 21 Fed. Rep. 417; *Cummings* v. *Nat'l Furnace Co.*, 60 Wis. 603; *Belair* v. *Chicago, etc., R. R. Co.*, 43 Iowa, 662." The evidence does not show that the hazards connected with making up freight trains in a switch yard require more than ordinary skill of an engineer, and not only does the contrary presumption arise from the burden resting upon the plaintiff, but we assume that where the speed of general transportation is not required, where the dangers incident to the meeting and passing of other trains operated at a high rate of speed are not incurred, where the lives of passengers and of persons using highway crossings are not imperiled, and where the large variety of risks from defective rails, bridges and machinery are not

encountered, no special skill is required from an engineer. Coy's skill as a fireman of a locomotive, and his long service in that capacity, with his opportunities to observe and learn the duties of an engineer, and how to discharge them, are not questioned; his intelligence, faithfulness, sobriety and industry are not denied, nor does the evidence disclose a single act of negligence on his part prior to his assignment to the duties of extra engineer on other occasions or the occasion complained of. In the discharge of the duties of engineer it is conceded that he had had some experience.

The circumstances do not, in our opinion, establish that he did not, when thus assigned to duty as an engineer, possess the requisite experience and skill for the proper discharge of that duty.

In *Texas, etc., R. R. Co.* v. *Berry*, 67 Tex. 238, it was held that one having served a reasonable time as fireman of a locomotive, and having occasionally had charge of such locomotive as engineer, was not necessarily unskillful and incompetent as an engineer. No position affords better opportunities to learn locomotive engineering than that of a fireman. Engineers, like those called to other positions of responsibility, must have their early experiences. Railway companies could not long operate if only long experienced engineers could be employed without liability for negligence, and opportunities for promotion would be denied to the beginner, however intelligent, industrious, apt and observing.

When it is remembered that the burden rested upon the appellee to show that Coy was not sufficiently skilled for the duties of engineer of a locomotive engaged in making up freight trains, and when we observe that special skill is not shown to have been required, and that beyond the claim of but a limited experience his capacity is not questioned, we feel that to hold the case made out

would require not only extraordinary care in selecting railway engineers for ordinary service, but would practically cast the burden upon the company to show the skill of the engineer.

The case of *Evansville, etc., R. R. Co.* v. *Guyton*, 115 Ind. 450, is urged against our conclusion in this case, but it will be observed that the cases are clearly distinguishable in the material element that in the case cited the service of operating a wild train was held to have required a conductor with more than ordinary skill, and that "there was some testimony from which the jury may have found that he was not possessed of sufficient familiarity with the time cards and with the technical language of train orders, and was not sufficiently quick of apprehension to be able to construe and interpret an order in connection with a time card, so as to be competent to act as the conductor of a wild train."

The alleged negligence of the associate switchman involves, first, an inquiry as to the evidence of the appellee upon the allegation of the company's negligence in employing him. He had been engaged during the afternoon, and his service began at six o'clock that evening, less than one hour before the occurrence complained of. His previous employment had been with the Chesapeake, Ohio and Southwestern Railway Company, in the city where the appellee was employed, and the most favorable view for the appellee of the evidence of negligence in employing him is that given by Edward Gore, the yardmaster for said last named company. It is as follows: Ealy, appellant's yardmaster, asked Gore for a man "and said he was short a man, and I told him I had one that he could have that I was done with, and he said 'all right; I will take him and probably give him a regular job.'"

Considering this evidence alone, does it raise the pre-

sumption of negligence in placing the man employed in the service of switchman?

Again, we are confronted with the rule that the burden rests upon the complaining party to establish the charge of negligence, and that negligence will not, in the first instance, be presumed. *Louisville, etc., R. W. Co.* v. *Sandford, Admx., supra*, and authorities there cited, and, also, *Davis* v. *Detroit, etc., R. R. Co.*, 20 Mich. 105, and *Summerhays* v. *Kansas, etc., R. W. Co.*, 20 Am. Ry. Rep. 359.

This rule requires us to indulge the presumption of due care until the evidence overthrows that presumption and establishes affirmatively the absence of reasonable care. The mere absence of evidence of care does not lend strength to the charge of negligence. Any departure from this rule will have the effect to abrogate the rule and to require of the employer an affirmative showing of diligence. In the ordinary transactions of individuals this rule is maintained, and under it the presumption in favor of care, good faith, and diligence is indulged, and we observe no reason for departing from it where a railroad company is the master and its servant is the unfortunate claimant for damages.

Indulging this presumption, and there being no evidence that the switchman had not had experience in, and acquaintance with, the service in which he was employed, or that the company did not test his knowledge of the service and acquaintance with its details, and his ability to perform such service, we must conclude that negligence was not shown in this respect.

As applicable to the employment of both the engineer and switchman, it will not do to say that negligence contributing to or producing the injurious results complained of should control the question of negligence in making the employment, for the most skillful may be

negligent, and it is not the negligence or failure to employ skill in the performance of duty subsequent to the engagement that determines the care of the employer to ascertain the degree of skill possessed at the time the servant is taken into the service. The questions here under consideration were decided as follows in the case of *Summerhays* v. *Kansas, etc., R. W. Co., supra.* "The company does not occupy the position of an insurer against the perils to which its employes may be exposed by reason of their employment. Its duty is discharged when competent fellow-servants are engaged. A single omission to exercise care by a fellow-servant (and that in the instance complained of) can not be taken in an action brought by another against the company as proof of the latter's liability. To give the co-employe a status in court, he must aver that the company whose liability he is seeking to establish furnished incompetent fellow-servants, or continued such men in its service after having notice of the same. In other words, he must bring his case within the well known exceptions which attach to the general rule, and which declares the master's exemption from liability for the negligent conduct of the co-employe in the same service. * * We take it to be the law that in a suit brought by a railroad employe against the company for damages caused by the alleged unskillfulness or negligence of another employe of the same company, the defendants are entitled to the presumption that they exercised due care in the employment of the person charged with unskillfulness or negligence, and that it had no knowledge of the defects of capacity or character imputed." See also *Davis* v. *Detroit, etc., R. R. Co., supra.*

Upon the theory that there was not sufficient evidence to establish the charges of negligence in employing the two servants, the engineer and switchman, the appellant

asked, and the court refused, an instruction that said charges were not sustained, and should be disregarded. There is no question as to the form of the instruction, but the appellee insists that its refusal was proper because the court, in other charges, fairly submitted to the jury the determination of the question of negligence in employing these two men, and because it was not the privilege of the court to take the question from the jury.

If there was evidence from which, by any reasonable construction, negligence could have been inferred, the court would have invaded the province of the jury in giving the charge refused; but, as we have held, there was no such evidence, and it was the duty of the court to give the instruction.

In *Faris* v. *Hoberg*, 134 Ind. 269, we reviewed many of the cases and reaffirmed the right and the duty of the trial court to take the question from the jury (upon proper request and instruction tendered) when any element essential to the finding of the fact in issue has not been proven, or there is not evidence of such fact from which, when undisputed, the jury would be justified in concluding that such fact existed. We are, therefore, of opinion that the trial court should have given the instruction so refused.

The evidence is unsatisfactory in showing either that the injury was the result of negligence of employes of the company or that appellee was free from contributory negligence, and it is a subject of serious doubt whether, under the evidence, the stiff link complained of is not one of the necessary incidents of railroading, and one of the hazards assumed. However, we do not pass upon that branch of the case, since concluding that a new trial should have been granted for the error above indicated.

The judgment of the circuit court is reversed, with in-

structions to sustain the appellant's motion for a new trial.

Filed March 7, 1894.

ON PETITION FOR A REHEARING.

HACKNEY, J.—Counsel for the appellee have presented an earnest and able petition for a rehearing, to which we have given careful consideration.

It is insisted that in adopting imperfectly the method of excepting to instructions, as provided by section 535, R. S. 1881, the appellant was precluded from employing another method of reserving exceptions to such instructions, namely, by a formal bill of exceptions. This contention rests upon the doctrine that where two or more remedies are given by the law for the enforcement of a right, the election of one of such remedies is an exclusion of any other, as where the remedy employed is by suit to review the right of appeal is thereby cut off.

This doctrine has no application to the mere incidents of practice, but applies to remedies, and has for its object the securing of a final determination of a controversy by one decision and the avoidance of vexatious litigation where one remedy is exhausted and another is then employed for the enforcement of but one right of action.

With the practice of reserving exceptions to instructions, and making them a part of the record, section 534, R. S. 1881, has nothing to do, as that section was designed to enable the parties to learn, before arguing a cause, what instructions would be given, and to permit such instructions to be read as a part of the arguments.

It is further complained that in our holding that the trial court should have given the instruction that there was a failure of proof upon two of the elements of negligence alleged, we stand in conflict with the holding in

Wabash, etc., R. W. Co. v. *Morgan*, 132 Ind. 430, where an instruction was asked to the effect that there was a failure of proof to show incompetency and negligence on the part of an engineer, etc., which instruction was refused and the refusal sustained. In that case the evidence is not discussed with relation to the instruction, and we are not enabled to say that there was a failure of proof upon the question to which the instruction was addressed.

The suggestion in that case that the instruction was properly refused, under the averments of the complaint, and that the appellee might have recovered by reason of defects in the engine, can certainly have no application to the question as to whether an instruction was proper, taking an element of the case from the jury because of a failure of evidence upon such element. If that case could be said to conflict with the proposition, ~~then~~ where there is a failure of evidence upon an element of a case, the court may take such element from the jury and thereby prevent a hodge-podge verdict, we would not hesitate to depart from it.

Upon the remaining questions discussed by counsel, we have said all that we deem necessary in the original opinion.

The petition for a rehearing is overruled.

Filed May 17, 1894.

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No. 16,798.

THE CITY OF INDIANAPOLIS *v.* BIELER.

INTERSTATE COMMERCE.—*Police Regulation by State.*—Congress may, by appropriate legislation, subject any article of interstate commerce to the police regulations of any State.

SAME.—*Intoxicating Liquors.*—Under the act of Congress approved August 8, 1890, intoxicating liquors transported from one State into another for use, sale, or storage in the latter State, are subject to its police regulations.

CITY.—*License of Breweries, etc.—Discrimination.—Constitutional Law.*—An ordinance of the city of Indianapolis licensing breweries, distilleries and their depots and agencies established in the city, with other wholesale dealers in malt liquors, but excepting from its operation residents of the city doing a wholesale business in bottled beer, is, as to the exception sought to be made, void for discrimination.

SAME.—*Ordinance Void in Part and Valid in Part.*—Where the part of an ordinance which is void for discrimination can be struck out, leaving the remainder complete in itself, sensible and capable of being executed against all alike, the latter will stand.

SAME.—*License Ordinance.—Language Construed.*—An ordinance requiring a license fee of "every person or persons, firm, corporation or company carrying on a distilling or brewing business * * and of all breweries and distilleries," applies to every establishment, and exacts a separate fee for each one.

SAME.—*License Fee.—Amount Discretionary With City Authorities.*—Where a city is granted power, by the Legislature, "to tax, license and regulate distilleries and breweries," etc., an ordinance imposing a license fee is an exercise of police power in restraint of a harmful occupation, and the fee to be required is subject to the discretion of the city authorities.

From the Marion Circuit Court.

L. O. Bailey, A. Q. Jones, A. Baker, E. Daniels and *J. E. Scott*, for appellant.

C. A. Korbly, W. O. Ford, D. W. Howe and *C. F. Coffin*, for appellee.

HOWARD, C. J.—By section 23 of "An act concerning the incorporation and government of cities having more

than one hundred thousand population according to the last preceding United States census, and matters connected therewith, and declaring an emergency," approved March 6th, 1891, Acts 1891, p. 137 (148), it is provided, amongst other things, that such cities shall have power "to tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries."

By virtue of the authority so given, the city of Indianapolis adopted the following:

"GENERAL ORDINANCE No. 17, 1891.

"An ordinance designating the license fee to be paid the city of Indianapolis by distilleries and breweries, and the depots or agencies in said city of all breweries and distilleries, and all wholesale dealers in malt liquor, as provided for by the Act of the General Assembly of Indiana, approved March 6, 1891.

"Section 1. Be it ordained by the common council of Indianapolis, that hereafter every person or persons, firm, corporation or company carrying on a distilling or brewing business within said city of Indianapolis, and all depots or agencies established in said city, of all breweries and distilleries, and all wholesale dealers in malt liquors, except as hereinafter provided, shall, before they are permitted to carry on their said business, pay to the city of Indianapolis, Indiana, for the general use and benefit of said city, the sum of one thousand dollars, which said sum of one thousand ($1,000) dollars shall be the annual city license fee to be charged.

"On payment of said sum of one thousand ($1,000) dollars, the applicant for such license shall present the receipt thereof to the city comptroller of said city, and such comptroller shall thereupon issue to such applicant a license to carry on and conduct such distilling or brew-

ing business, or such depot or agency, or such wholesale dealing in malt liquor, as the case may be, for one year from such time, which license shall be signed by the mayor of said city.

"The terms of this ordinance, however, shall not apply to any resident engaged in the wholesale business of bottling, or bottling and vending bottled beer.

"Section 2. Said city comptroller shall keep a register of the names of every person or persons, firm, company, corporation, depot, agency or dealer receiving from said city such license, with the date when issued and the expiration of the same; for which services a comptroller's fee of one dollar ($1) shall be paid by the person receiving such license.

"Section 3. Any person or persons, firm, company, or corporation carrying on a distilling or brewing business in said city, or the owners or managers of the depots or agencies of any brewing or distilling business, or any wholesale dealer or dealers in malt liquor, who shall violate any of the provisions of this ordinance shall, upon conviction, be fined in any sum not exceeding one hundred dollars ($100), and each day's continuance in violation of this ordinance shall constitute a separate offense.

"Section 4. This ordinance shall take effect and be in force from and after its passage and publication one day each week for two successive weeks in '*The Sun*,' a daily newspaper of general circulation, printed and published in the city of Indianapolis, Marion county, Indiana."

The appellee was arrested and fined in the police court of the city of Indianapolis, for the violation of sections one and three of this ordinance.

On appeal to the Marion Circuit Court there was a finding and judgment for the appellee, from which the city brings this appeal.

From the answer filed by appellee in the circuit court, to which answer a demurrer was overruled, it appears that at the time of the passage and taking effect of said ordinance the appellee was, and still is, the local agent in and for the city of Indianapolis, of the Anheuser-Busch Brewing Association, a corporation located and having its chief office and place of business in the city of St. Louis, in the State of Missouri, and organized under the laws of that State; that for a long time before and since the passage of said ordinance said association has been engaged in the manufacture of beer in the city of St. Louis, and in selling the same to citizens of Indianapolis and other cities and towns in the State of Indiana, said beer being shipped to, and sold by, appellee, partly in barrels, partly in kegs and partly in bottles; that before and since the passage of said ordinance, said association had, and still has, a depot in said city of Indianapolis, in charge of appellee as its local agent, where the beer shipped by said association for the supply of its customers in the city of Indianapolis and other places in the State of Indiana is temporarily stored until the same is disposed of and delivered by appellee to said customers; the said depot has been, and still is, used by said association only as incident to, and as a means of carrying on, its said business of supplying its customers in said city of Indianapolis and elsewhere in the State of Indiana, said depot being provided with facilities for what is called "cold storage," without which said beer could not be kept in good condition until delivered to its customers; that it has heretofore been, and still is, the custom of said association to ship in barrels and kegs and bottles, beer manufactured by it and designed for sale to its customers in Indianapolis and elsewhere in the State of Indiana, to appellee as its agent in said city,

by whom it is then stored in said depot until taken out by him for delivery to said customers, all of the sales so made by him being at wholesale and none at retail.

In addition to the facts so averred, it was agreed on the trial, as shown by the bill of exceptions, that there are three breweries in the city of Indianapolis, all, however, owned and operated by one association, also located in said city; that there are but three persons, or firms, residing in said city who are engaged in bottling and vending bottled beer; that besides the corporation represented by appellee, there are several corporations, firms, and persons who own and control breweries at places outside of Indianapolis, and who are engaged in the business of selling at wholesale the beer manufactured by them to citizens of Indianapolis and of other cities and towns in Indiana, by means of depots, agencies and agents located in the city of Indianapolis; that some of these, including the corporation represented by appellee, are located outside the State of Indiana, while the others are located within the State, but without the city of Indianapolis; that the cost of issuing the license provided for in the ordinance does not exceed two dollars.

On this appeal the appellee contends that the ordinance in question is invalid, and in support of such contention advances the following propositions:

"First. That the ordinance in question is void in so far as it authorizes the taxation or licensing of depots or agencies of nonresident breweries engaged in interstate commerce.

"Second. That the ordinance is void because it makes unjust and illegal discriminations between those engaged in the same business, and tends to create monopolies.

"Third. That the illegal portions of the ordinance are so essential to, and are so intimately connected with,

the general plan of it, as to render the whole ordinance illegal.

"Fourth. That neither the police power nor the taxing power delegated to the city by the city charter act, authorized the city to exact the license fee of $1,000."

As to the first proposition, it is now well settled that the power of congress is supreme over interstate commerce, as well as over foreign commerce; even so far that the failure of Congress to legislate upon the subject does not authorize interference by the State. *Crutcher* v. *Kentucky*, 141 U. S. 47; *Wabash, etc., R. W. Co.* v. *Illinois*, 118 U. S. 557; *Brimmer* v. *Rebman*, 138 U. S. 78.

In *McLaughlin* v. *City of South Bend*, 126 Ind. 471, it was said by this court: "The decisions of the Supreme Court of the United States declare that an ordinance requiring a license fee from agents representing citizens of another State, who offer goods not in this State for sale by sample, is void, because it assumes to establish a regulation affecting commerce between the States. *McCall* v. *California*, 136 U. S. 104; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Asher* v. *Texas*, 128 U. S. 129; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. * * * If the goods offered for sale had been in this State at the time of the sale, although there was no delivery to the purchaser at that time, the Federal decisions would not, as we believe, rule the case."

It is clear from the authorities, then, that if the goods are located in another State at the time they are sold in this State, the agent so selling the goods can not be required to take out a license. *Robbins* v. *Shelby County Taxing Dist.*, *supra*, and other cases cited above; *Martin* v. *Town of Rosedale*, 130 Ind. 109.

Counsel for appellant, however, contend that while the exclusive authority of Congress over interstate commerce is unquestionable, and while it is also true that

so long as Congress remains silent as to any branch or article of interstate commerce, such silence is an indication of the will of the National Legislature that this branch or article of commerce should remain unrestricted; yet that Congress may, by appropriate legislation, subject any article of interstate commerce to the police regulations of any State.

This contention can not be gainsaid. Congress having exclusive control over the commerce between the States, may undoubtedly subject such commerce to the laws of the States; and the only inquiry must be whether this has in fact been done by Congress by the enactment of a valid law.

Congress has so spoken, and in relation to the particular article concerned in this case. This law of Congress, which was approved August 8, 1890, provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or territory, be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This law was found valid by the Supreme Court of the United States. *In re Rahrer*, 140 U. S. 545; *Commonwealth* v. *Calhane*, 154 Mass. 115.

Beer being a fermented, intoxicating liquor or liquid, it follows that the depots or agencies of nonresident breweries, in which depots or agencies such beer "is temporarily stored until the same is disposed of," are "subject to the operation and effect of the laws" of this

State, "enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors" were produced in this State. The question as to interstate commerce is, therefore, eliminated from the case at bar.

The next proposition is, that the ordinance is void because it makes unjust and illegal discriminations between those engaged in the same business, and tends to create monopolies.

It is not necessary to multiply citations of authority to show that an ordinance is invalid which discriminates in favor of residents of the city or State as against nonresidents. Cooley Const. Lim. (6th ed.), 479, and following pages and notes. *Graffty* v. *City of Rushville*, 107 Ind. 502. The ordinance will also be void if it discriminate in favor of some residents as against other residents. 1 Dill. Munic. Corp., sections 322, 327, 362; Cooley Tax., sections 128-9; *Ex parte Frank*, 52 Cal. 606; *Bills* v. *City of Goshen*, 117 Ind. 221; *City of Plymouth* v. *Schultheis*, 135 Ind. 339.

Under this head, objection is made to the following clause of the first section of the ordinance: "The terms of this ordinance, however, shall not apply to any resident engaged in the wholesale business of bottling, or bottling and vending bottled beer."

It is very clear that this clause is invalid for two reasons. It discriminates in favor of residents as against nonresidents. It also discriminates in favor of residents who bottle and vend bottled beer as against residents who vend beer in barrels, jugs, or otherwise. The classification thus attempted to be made is arbitrary, and can not stand. While the subjects of legislation may be, and indeed should be, classified; yet the lines of such classification should be well marked, and should include all individuals of like kind in like situation. Here, the

things to be licensed are breweries, distilleries and their depots and agencies established in the city, with other wholesale dealers in malt liquors. The classification being thus made, and properly so made, it will not do to except individuals of that class who are residents or who do a wholesale business in bottled beer. *State, ex rel.*, v. *Sheriff, etc.*, 48 Minn. 236; *State, ex rel.*, v. *Hammer*, 42 N. J. Law. 435; *Mayer, etc.*, v. *Weed*, 84 Ga. 683.

But, as was said in *Clark* v. *Ellis*, 2 Blackf. 8: "A part of an act of assembly being unconstitutional, does not affect a constitutional part of the same act relative to the same subject. That part which is unconstitutional, is considered as if stricken out of the act; and if enough remains to be intelligibly acted upon, it is considered as the law of the land." This is the law, as recognized in numerous cases. *State* v. *Newton*, 59 Ind. 173; *Ingerman* v. *Noblesville Tp.*, 90 Ind. 393; *State, ex rel.*, v. *Blend*, 121 Ind. 514; 11 Am. and Eng. Encyc. Law. 610.

In the case at bar, by striking from the ordinance the discriminating and void clause, that which is left is complete in itself, sensible and capable of being executed, and wholly independent of that which is rejected.

It is also insisted that the ordinance is discriminating, as favoring a corporation known as the Indianapolis Brewing Company, counsel contending that this company, which owns three breweries in the city, will have to pay but one fee of one thousand dollars, while other wholesale dealers will have to pay one thousand dollars each, and so a monopoly will be created in favor of the city company.

An examination of the ordinance discloses no such meaning in its language. The statute provides for licensing distilleries and breweries and their depots or agencies in the city. The ordinance uses somewhat different language, but the meaning is evidently the same.

The license is required of "every person or persons, firm, corporation or company carrying on a distilling or brewing business within said city of Indianapolis, and all depots or agencies established in said city, of all breweries and distilleries, and all wholesale dealers in malt liquors."

The plain meaning of this language is that each such establishment shall be duly licensed before being authorized to do business. Of course the respective owners are the persons to pay the several fees for the licenses. But each distillery, each brewery, each depot or agency of any such distillery or brewery, and each other wholesale establishment for selling beer, by the provisions of the ordinance, is required to pay the separate fee.

The circumstance that one person or one company owns two or more breweries, depots, or other establishments, could not operate to cancel one or more license fees, leaving the individual or the company to pay but one fee.

As well might it be said that if one man or one corporation should own two or more saloons, such person or corporation would have to pay but one license for all the saloons. It is the saloon, in the one case, and the brewery or other wholesale establishment in the other case, that is licensed; and each saloon or brewery, as the case may be, is taxed a separate license fee.

We quite agree with counsel that the city "has no more authority to require or to give a general license for carrying on the business of brewing, under which a firm or syndicate may carry on a dozen breweries, than it would have to give a general license to carry on the saloon business, under which a firm or syndicate might carry on a dozen saloons." One contention would be as inequitable and absurd as the other. But there is no one but appellee who is seeking to give the ordinance

this interpretation, an interpretation too which the words of the ordinance will not bear. Indeed, the giving of such a meaning to the ordinance seems but the building up of a card house only to show how easily it can be knocked down again,

What we have already said sufficiently answers the third proposition of counsel. We have seen that the illegal parts of the ordinance may be readily separated from those that are legal, so that the latter may stand as a complete and valid ordinance, imposing a license fee on each distillery, brewery, agency or depot of a distillery or brewery, and every other wholesale establishment in the city for the sale of malt liquors.

The fourth proposition of counsel questions the power of the city to levy the tax provided in the ordinance. The power granted to the city by the Legislature, in this regard, is "to tax, license and regulate." It is a police power, and may be delegated by the State to the city. The power of the Legislature to do this can be limited only by the constitution; but there is nothing in the constitution prohibiting the Legislature from extending such power to the city. *Lutz* v. *City of Crawfordsville*, 109 Ind. 466.

Appellee argues that because the cost of issuing a license is small, and because the expense to the city of the regulation of the business is but little, therefore, the tax is for revenue, and not a police regulation. This is to misapprehend wholly the purpose of this class of legislation.

It is said, in *Emerich* v. *City of Indianapolis*, 118 Ind. 279: "Liquor sellers are subjected to the payment of a special tax, because the object of this class of legislation is to restrict the business. * * * The theory of the legislation upon this subject is, that the business is one

which requires restraint because it is harmful to society."

It is, as said in *Bright* v. *McCullough, Treas.*, 27 Ind. 223, an indirect tax, "imposed not merely for the purpose of revenue, but in restraint of a particular business or calling, or as a license on particular pursuits, or as a mere police regulation," and so does not come within the spirit of the provisions of the constitution relating to taxation for revenue.

For further authorities to show that all statutes which merely assume to regulate the sale of intoxicating liquors, and to prohibit sales by persons other than those who are licensed by the public authorities, are valid and constitutional, as an exercise of ordinary police regulations, see 11 Am. and Eng. Encyc. of Law, 583, and notes.

What is said by counsel, therefore, and the authorities cited, to show that the ordinance is invalid as an attempted exercise by the city of the taxing power, are not in point. The ordinance is an exercise of the police power expressly granted to the city by the Legislature, in restraint of an occupation which the law regards as harmful to society, and as such it is subject to the discretion of the city authorities.

In *A Coal Float* v. *City of Jeffersonville*, 112 Ind. 15, it is said that "an ordinance can not be held to be unreasonable which is expressly authorized by the Legislature." It follows, from what we have said, that the court erred in overruling the demurrer to the second paragraph of the answer, and also in overruling the motion for a new trial.

The judgment is reversed, with directions to grant a new trial, and for further proceedings in accordance with this opinion.

Filed Mar. 15, 1894; petition for rehearing overruled May 18, 1894.

No. 16,764.

RAUGH, ADMINISTRATOR, *v.* WEIS ET AL.

ADMINISTRATOR.—*Court Control of.—May be Ordered to Dismiss Action. —Costs.—Legacy.—Distribution.—Foreclosure of Mortgage.*—It is within the power of the circuit court, having probate jurisdiction, to order an administrator with the will annexed to dismiss a suit in another court to foreclose a mortgage against legatees, upon a showing by the latter that the debts of the estate are paid; that the same is ready for final settlement; that the mortgage debt is less than their share, and that they are willing to accept the amount of such debt upon distribution; and if it appears that the suit was wrongfully brought, it may be ordered dismissed at the administrator's costs.

From the Marion Circuit Court.

W. F. A. Bernhamer, *F. J. Van Vorhis* and *W. W. Spencer*, for appellant.

A. C. Ayres and *A. Q. Jones*, for appellees.

MCCABE, J.—The appellant is the administrator with the will annexed, of Anna E. Schuessler, deceased, and the appellees, Anna M. Weis and Elizabeth Mueller, and the children of Catherine Raugh, now deceased, who are also the children of the appellant, who is their legally appointed guardian, are the sole legatees and devisees mentioned in the last will and testament of said testatrix.

After the debts and liabilities of the estate had all been settled and paid, there was not enough money in the hands of the administrator to pay the cash legacies provided for in the will. The appellant, as administrator, under the order of the circuit court, sold a piece of real estate belonging to the said estate to raise money to pay said legacies. The real estate sold for three thousand dollars in three payments, one thousand cash in hand, two other payments of one thousand dollars each in nine and eighteen months. The appellees became the pur-

chasers, paid the thousand dollars and executed two notes of one thousand dollars each for the deferred payments to the appellant, as administrator, with a mortgage on the premises securing the payment of the same.

The appellant, as administrator, brought suit in the superior court to foreclose the mortgage and collect the notes. The appellees filed a petition in the circuit court stating, in addition to the facts above recited, that prior to the application to the circuit court for an order for said sale the appellant and his attorneys represented to appellees that, in order to pay the legacies named in the will, it would be necessary to sell certain of the real estate belonging to said estate, and that the expense of selling the same would be very small, as there would be little to do, and that immediately thereafter a distribution of the assets realized from the sale of said property would be made, and that said administrator proposed that if appellees would purchase one portion of said real estate for $3,000, they would be called upon to pay but the $1,000 in cash, and would not be called upon to pay said notes, but the same would be distributed to them as their distributive portion of said estate, under the will, before January 1st, 1892; that relying thereon appellees purchased said real estate on the 17th day of November, 1891, paid the $1,000 in cash, and executed the two promissory notes as proposed; that said sale has been reported to and confirmed by said court; that since said sale, and since January 1st, 1892, appellees have requested and demanded of said administrator that a distribution be made; that there are no claims or charges against the estate that remain unpaid; that said administrator has already been allowed $150 for his services, and his said attorney has been allowed $250 for his services in said estate; that said administrator and his said attorney, as a condition of the aforesaid distribution, demanded that the appel-

lees agree that said attorney should receive $100 more for his services herein, and said administrator should receive $50 more, which demand appellees refused to accede to, claiming that if any further allowance should be made it must be done by order of the Marion Circuit Court; that thereupon said administrator, the appellant, brought suit in the Marion Superior Court to foreclose the said mortgage securing the payment of said two promissory notes, and that said suit is now pending in said last named court; that the year since the appointment of appellant as administrator expired on the 9th day of September, 1892; that the sole purpose and intent of said suit is to harass and annoy appellees in the effort to compel them to accede to the demands of said administrator and his attorney for a further allowance; that said suit is without any other reason, as appellees are willing to receive, and have frequently demanded, that said mortgage notes be distributed to them as a part of their distributive share of said estate, their interest in said estate being largely in excess of the amount of said notes.

Prayer that the court will order and direct said administrator to dismiss, at his own expense, and without cost to the estate, said suit on said notes and mortgage so pending in said superior court; and that the court also direct and order said administrator to immediately make a final report and pay into court the assets of said estate and make distribution thereof according to law.

The appellant's demurrer to said petition for want of sufficient facts was overruled, and on a hearing of the evidence the court rendered judgment in accordance with the prayer of the petition over a motion for a new trial. These rulings are the only ones assigned here for error, that have not been waived for failure to argue them in appellant's brief.

An administrator is an officer of the court having probate jurisdiction, and in the management of the trust committed to him by that court in his appointment is at all times subject to all lawful rules and orders that such court may make touching the management of the same. 7 Am. and Eng. Encyc. of Law, 170, and authorities there cited.

An administrator is also a trustee for those interested in the estate he represents. *Smith* v. *Calloway*, 7 Blackf. 86; *Nugent* v. *Laduke*, 87 Ind. 482; 7 Am. and Eng. Encyc. of Law, 233, and authorities there cited.

In 1 Perry on Trusts, section 427, it is said: "All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and *cestui que trust*." See authorities in note 1 to that section.

Here it is circumstantially alleged that the only object to be accomplished by the suit to foreclose the mortgage and collect the notes is to make a profit to the administrator and his attorney. That there are no unpaid claims against the estate, and that the $1,000 which appellees have paid is amply sufficient to pay the cash legacies named and provided for in the will, and that it was agreed and understood, when the order of sale was secured and when appellees became purchasers of the real estate, that as their distributive share of the estate under the will far exceeded the amount of the two notes they should be distributed to them instead of and for so much cash. But because appellees would not consent to allow the administrator and his attorney each a compensation in excess of what the court had allowed them, and because appellees proposed to make no additional

allowance for such services unless the circuit court should so order, appellant refused to distribute the assets in his hands pursuant to the understanding, and refused to rely on the court for the additional compensation demanded, and brought the suit to foreclose for the sole purpose, as is alleged, to harass and annoy appellees into a compliance with the demands of appellant and his attorney. The demurrer admits these facts to be true. All persons having an interest in the estate were before the court, and none of their interests would be subserved by the prosecution of the suit in the superior court to foreclose the mortgage and collect the notes, but all of their interests would be manifestly impaired and injuriously affected in the amount that it would cost to collect through foreclosure proceedings the $2,000. All that could be saved by distributing the notes to the appellees without such expense pursuant to their previous consent and agreement to receive them as that much money, and their subsequent demand for such distribution.

But counsel say that sections 2535 and 2536, 1 Burns' Rev. St. 1894 (sections 2379 and 2380, R. S. 1881), must be complied with before such a distribution can be demanded, and that the previous agreement or arrangement under that statute is a mere nullity. Those sections have no bearing on the question, for they provide for the method of obtaining an order on the administrator or executor to pay over a portion of the share to a distributee or legatee on his giving bond in advance of the final settlement and distribution. The relief here sought had no reference to an order for a partial distribution in advance of the final settlement, but it had reference to a final settlement and distribution.

Section 2537, of the same statutes (section 2381, R. S. 1881), provides that "after one year from the granting

of letters, the executor or administrator may, if the estate be solvent, discharge the specific legacies and pay the general legacies bequeathed by any will, if there be sufficient assets.''

This section is more applicable to the state of facts set forth in the petition than those referred to by appellant. But, aside from any statutory provision, it was within the equity powers of the court, on proper application of those interested in the estate, to make any and all such orders on its officer whom it had appointed as would best subserve and protect the interest of those entitled to the estate as distributees.

The petition was sufficient to call into exercise those powers, by calling the attention of the court to the abuse by the administrator of the trust the court had reposed in him in promoting his own interest. The previous agreement of the administrator with appellees is of no particular significance more than to show that the appellees were willing to receive the notes on distribution of the estate instead of, as and for so much money, and the petition shows that they were still willing and insisting on so receiving them. This left no excuse for the administrator to incur the expense to collect them, especially as the facts stated, and admitted by the demurrer, show that the practical effect of such collection, under the circumstances, would be to compel the appellees to pay the money to the administrator that he might pay it back to them again on distribution. It is axiomatic that when the hand that is to pay is the same hand that is to receive, the law considers the payment as already made, without any further ceremony about it. It is true this is not exactly that kind of a case, but it is closely akin to that class of cases.

Practically, under the circumstances, the appellees were to pay the two notes of $2,000 in the aggregate, and

they were to receive the $2,000 back from the administrator. There was no necessity that the money should be passed from their hands to those of the administrators in order that it might be passed back to their hands by the administrator.

It is insisted that the circuit court had no jurisdiction to interfere with the process and proceedings of a court of co-ordinate jurisdiction, as the superior court was, which had first obtained jurisdiction of the foreclosure suit.

It is a sufficient answer to this contention that the relief sought in the petition did not propose to interfere with the process of the superior court. It only proposed that the circuit court should exercise jurisdiction over its own officer, an officer of its own appointment, and over his personal conduct in the management of a trust confided to him by that court. The petition sought no order against the action of the superior court, but it is confined to a request that the circuit court should control the personal conduct of its own officer. If, in the exercise of such power over its own officer, it causes him to dismiss an action in the superior court, that in no way interferes with the jurisdiction of the superior court.

We are therefore of opinion that the circuit court did not err in overruling the demurrer to the petition. It is not denied by the appellant that the evidence, which is in the record, tending to support the finding, fully and amply sustains the finding of the court; and it is conceded that we can not weigh the evidence.

It is insisted that it was error to order the dismissal of the foreclosure suit at the personal costs of the administrator. It has been held by this court, where an administrator knowingly brings a wrong action, he is personally liable for the costs. *Harrison, Admr.*, v. *Warner*, 1 Blackf. 385.

The court heard all the evidence, and we are of opinion that it justified the finding and judgment of the court. Therefore, the circuit court did not err in overruling the motion for a new trial.

Therefore, the judgment is affirmed.

Filed May 8, 1894.

No. 16,641.

KAUFMAN *v.* STEIN.

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NUISANCE.—*Injunction.*—*Removal of Wooden Building Within City Fire Limits.*—A property owner may maintain a suit to enjoin the removal of a wooden building to a place within the fire limits, in violation of a city ordinance forbidding it, where it is to be located dangerously near the plaintiff's frame house.

SAME.—*City.*—*Protection Against Fire.*—*Inherent Power.*—A city in this State, without reference to any legislative grant, has inherent power to prescribe fire limits, and to prohibit the removal of wooden buildings into such limits.

SAME.—*Removal of Buildings.*—*What Amounts to.*—When fire limits are established, it is presumed that it is with reference to the existing location of buildings within such limits, and the subsequent removal of a wooden building to a point twenty feet distant upon the same lot is within the inhibition.

From the Vigo Circuit court.

T. W. Harper and *A. B. Felsenthal*, for appellant.

J. Jump, *J. E. Lamb* and *J. C. Davis*, for appellee.

DAILEY, J.—This was an action for an injunction commenced by the appellant against the appellee. The appellee entered an appearance to the action, and filed a demurrer to the complaint, for the reason that the complaint "does not state facts sufficient to constitute a cause of action against the defendant." The material allegations con-

tained in the complaint are as follows: 1. That plaintiff (appellant) is the owner of lot 31, in Rose's addition to the city of Terre Haute. 2. That there are, upon said lot, a dwelling house and other buildings. 3. That defendant owns an adjoining lot to plaintiff's said premises. 4. That upon defendant's lot there is a large frame building. 5. That both plaintiff and defendant's lots are within the fire limits of the city of Terre Haute. 6. That the common council of the city of Terre Haute had lawfully adopted an ordinance establishing "fire limits;" a copy of which is filed with the complaint and marked "Exhibit A," and which ordinance was in full force at the time of the commencement of this suit. 7. The ordinance provides that no wooden buildings shall be erected within said limits; that if such building has been heretofore erected within said limits, and it shall be removed, it shall not be relocated within the fire limits. 8. That defendant is about to remove the said frame building now on his lot, and relocate the same within said limits, twenty feet nearer plaintiff's house, and within four feet of plaintiff's property, and ten feet from plaintiff's frame dwelling house, thereby increasing the danger from fire, and making the danger imminent, increasing cost of insurance, etc. 9. That the defendant has the tools, men and machinery ready to remove the same, and will do so unless restrained. 10. That defendant will not encase his said frame building with stone, iron or brick, so as to render it fire proof. The court sustained the demurrer, to which appellant excepted and stood on his complaint, whereupon the court rendered judgment for appellee, from which ruling and action of the court appellant duly appealed. In the case here presented the complaint avers, and the demurrer admits, that the removal and relocation of the appellee's frame building, as threatened, will put the ap-

pellant's property in imminent danger from fire. From the briefs of counsel it appears that one point made by counsel for the appellee in argument on the demurrer before the court below was "that the plaintiff was not entitled to maintain this action, but that the city could alone enforce the penalty provided by the ordinance," "or in other words, that an individual could not have an injunction in such a case, even if the ordinance in question here was, in all its provisions, valid, as being within the power of the common council to adopt, because the only remedy in such case was by a prosecution in the name of the city for a violation of the ordinance." Counsel say they do not rely upon this proposition. They concede that "where an individual shows that he suffers or will sustain special damages or injury, above and beyond what the public generally will suffer, by reason of anything which may constitute an injury or damage to the public generally, he may maintain such an action as is proper in the given case to recover damages for, or to prevent the doing of, such a thing." An individual has, and always had, the right to enjoin the erection or continuance of a nuisance where he will suffer a special injury or annoyance, different in kind and degree to that sustained by the public generally. *Keiser* v. *Lovett*, 85 Ind. 240; *Reichert* v. *Geers*, 98 Ind. 73; *Owen* v. *Phillips*, 73 Ind. 284.

In *Baumgartner* v. *Hasty*, 100 Ind. 575, at p. 579, it is said: "It is one of the oldest of the common law rules, that an individual citizen may, without notice, abate a nuisance; and, if necessary to effectually abate it, destroy the thing which creates it." A wooden building is not a nuisance *per se*. It is the circumstances that make it a nuisance. A powder mill is not a nuisance *per se*, nor is a slaughter house, or glue factory, but if located in populous neighborhoods they are nuisances. And "even

when they are originally built in a place remote from the habitations of men, or from public places, if they become actual nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads, or the erection of the dwellings, is no defense." Wood Law of Nuisances, 572; *Reichert* v. *Geers*, *supra*, at p. 75; *Baumgartner* v. *Hasty*, *supra*, 575. In the case last cited, ELLIOTT, J., says: "A wooden building is not, in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. * * * There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law," etc. Citing Wood's Law of Nuisance, section 109.

We think the complaint under consideration brings this case within the rule thus laid down, as it is alleged that the building is a wooden structure; that it will be removed to a place within the fire limits in violation of a city ordinance forbidding it, and that it will be located within ten feet from the plaintiff's frame house, making the danger imminent.

Upon the proposition "that the common council of the city of Terre Haute had no power to pass the ordinance in question," it is insisted that "inasmuch as the charter had granted certain specific powers to the city * * * none other could be exercised."

The charter provisions are found in R. S. 1881, section 3106; Burns' R. S., 1894, section 3541, subdivision 32, which provides that the common council shall have power "to prevent the erection of wooden buildings in such part of the city as the common council may determine."

Also, in sections 3198 and 3199, R. S. 1881, being sections 3661 and 3662, Burns' Rev. 1894. It is clear that the specific power granted by subdivision 32, *supra*, is to prevent the "erection" of wooden buildings. Nothing is said about the "removal," and it is insisted, therefore, that so much of the ordinance as attempts to prevent the removal of wooden buildings within or without the fire limits is *ultra vires* and void, and in contravention of a common right of an owner to do as he pleases with his own property.

The provisions of the ordinance are, in brief, as follows:

Section 1. Defines the fire limits.

Section 2. Provides that no frame building shall be erected within the fire limits.

Section 3. Provides a penalty for removing, or assisting to remove, any frame building from a point within or without to a point within the said fire limits.

Section 4. Provides that any building so erected or removed shall be deemed a nuisance.

Section 5. Provides against the location of lumber yards within said limits.

Appellant admits that the authority to pass an ordinance against the removal of a wooden building is not specifically granted, but insists that it comes within the intention of the Legislature. That the object of granting the power to the city was to enable the common council to take precautions against the destruction of the city by fire.

In the case of *Clark* v. *City of South Bend*, 85 Ind. 276, the same point was presented that is now urged, but the court said: "This is a more narrow view of the subject than the books warrant counsel in assuming."

If the ordinance in question concerning removals of buildings is so in derogation of common right as to be void, and if the common council is restricted in its leg-

islative acts to such ordinances only as are literally in compliance with the statutes, it could not prohibit the removal of frame buildings, but only the erection thereof, within the limits, and any person so desiring could construct his house outside of the fire limits and then remove it to a place within, and by a series of removals there might be no end of frame buildings brought within such limits. Such construction would permit parties to accomplish indirectly what they could not do directly, and so evade the ordinance as to render it nugatory. If the power is to be strictly construed, what is there to prevent the erection of a lumber yard upon each vacant lot of the city? The express power is "to prevent the erection of wooden buildings." A lumber pile is not a building, and there is no express power given the city to prevent a lumber yard within the fire limits, yet who would question the inherent right of the council, in the exercise of its police power, to provide against and inhibit the keeping of such combustible material so as to endanger property rights?

In the case of *Clark* v. *City of South Bend*, *supra*, the ordinance prohibited the accumulation of straw. The court said: "There can be no doubt that the Legislature meant to confer broad powers upon municipalities in the matter of providing against danger from fires."

And the ordinance was held valid, even though, as here, there was no express power.

It is simply a police regulation, and, as is said in *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425: "Of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution, as we read it, and they were made in the exercise of a police power necessary to the safety of the city."

It is provided in section 3155, R. S. 1881, being sec-

tion 3616, Burns' Rev. 1894, that: "The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the State, and necessary to carry out the objects of the corporation."

We think the ordinance in question violated no provision of the constitution or laws of this State, and that without any charter provision the ordinance would be a valid act based upon an inherent right.

We are aware that the doctrine of inherent right is disputed in some of the States, as appears by the following authorities: *State* v. *Schuchardt* (La., 1890), 7 So. Rep. 67; *Kneedler* v. *Norristown*, 100 Pa. St. 368; *City of Des Moines* v. *Gilchrist*, 67 Iowa, 210; *Pye* v. *Peterson*, 45 Tex. 312.

But, in 15 Am. and Eng. Encyc. of Law, p. 1170, it is said: "The decided weight of authority in this country is, that municipal corporations have the power, under the general welfare clauses usually contained in their charters, *without express legislative grant*, to establish fire limits, forbidding the erection of wooden buildings, etc."

To support this doctrine the author cites a great number of decisions, and, in note 1, says: "These cases all rest on solid principle, for the rule has always been that a municipal corporation has the *inherent power* to enact ordinances for the protection of the property of its citizens against fire." Citing the cases (among others): *Clark* v. *City of South Bend*, *supra*; *Baumgartner* v. *Hasty*, *supra*; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; Kent's Comm., 339.

The remaining question to be considered is, was there an erection of a building or a removal thereof, within the meaning of the ordinance?

In some of the States the removal of a building and

locating the same upon another spot, is held to be an "erection." *Wadleigh* v. *Gilman*, 12 Me. 403.

Also, "to enlarge or elevate a wooden building so as to alter its character, is an erection of such building within the meaning of the ordinance." *Douglass* v. *Commonwealth*, 2 Rawle (Pa.), 262.

In Connecticut, however, a removal taking place wholly within the fire limits is not such "erection." *Daggett* v. *State*, 4 Conn. 60; *Booth* v. *State*, 4 Conn. 65; *Tuttle* v. *State*, 4 Conn. 68; *State* v. *Brown*, 16 Conn. 54; *Brown* v. *Hunn*, 27 Conn. 332.

The word "erect" is defined, in Anderson's Law Dic., p. 410: "To lift up, build, construct; as to erect a building, a fixture." "Removing a building is not erecting it; nor is elevating or materially changing it."

The weight of authorities supports the position held by the courts of Connecticut on this question.

It is insisted, by the appellee, that as the act threatened does not contemplate the taking of the house from the lot it occupies, it would not constitute a removal within the meaning of the ordinance.

Webster defines the word remove to be: "To move away from the position occupied; to cause to change place; to displace; as, to remove a building."

Of course the removal must be a substantial one. The mere turning of a building, or the change of the foundation so as to permit the erection of a bay window, would hardly come within the rule. But the fact that the structure is not to be taken from the lot upon which it was originally built, or where it stands, can not be the criterion. The word "lot" contains no legal or other meaning as to quantity, except it is a distinct portion of land, usually smaller than a field. It is such part as the owner may fix in his plat. It may be large or small. A man might move his house over considerable space

and still leave it on his lot. If the house were taken from one man's land and located on another's, there can be no doubt it would be a removal, and yet, the test is not that by the contemplated change the house is to be set in a particular spot or position.

The allegation is that the appellee was about to remove it twenty feet nearer appellant's land and within ten feet of his house. That assertion is admitted, by the demurrer, to be true. This court can not say, as a matter of law, that a removal of twenty feet is not a substantial removal of the house. If it was not a removal, the facts showing that it was a mere change should have been stated by way of answer.

The language of the complaint is "That defendant is about to remove the said frame building upon his lot and relocate the same within said [fire] limits, twenty feet nearer the plaintiff's house and within four feet from plaintiff's property, and ten feet from plaintiff's frame house, etc."

It will be thus seen that the charge is that defendant is about to remove and relocate the entire building. The expression used negatives the idea that the mere form of the building was to be changed, and conclusively shows that the intended change materially increases the risk and danger from fire to plaintiff's building, and also increases the rate of insurance. It is true a removal of twenty feet is not a great one, but if the appellee can evade the provisions of the ordinance by removing his house and relocating it twenty feet away from its former location, on like reasoning, why not two hundred or two thousand feet?

If appellee had sold part of his lot, and the purchaser had desired to buy and remove the house in question twenty feet nearer plaintiff, and relocate it upon the part of the lot so purchased, would anybody contend it would

not constitute a removal? We think it can make no difference as to whom the property upon which it is to be removed and relocated belongs. When the common council of the city defined the fire limits, it is presumed they did so with reference to the exact location of all the buildings within the limits.

In our opinion, the court erred in sustaining the demurrer to the complaint.

For this error, the judgment of the court below is reversed, and the cause remanded, with instructions to overrule said demurrer.

Filed May 8, 1894.

No. 16,620.

HELTONVILLE MANUFACTURING COMPANY ET AL. *v.* FIELDS.

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MASTER AND SERVANT.—*Defective Machinery.—Personal Injury.—Knowledge of Defects.—Complaint.*—In action by a servant against the master for injuries sustained by reason of defective machinery, an allegation that the master knew of the defects, and that the servant had no knowledge thereof and could not observe the same, for stated reasons, it is sufficiently shown that the master and servant were not on an equality as to the observation of the defect.

PLEADING.—*Complaint.—Motion to Make More Specific.*—It is not error to overrule a motion to make a complaint more specific where the specific allegations could not have weakened the complaint, and were not essential to advise the defendant of the cause of action he is called upon to defend.

INSTRUCTIONS TO JURY.—*Refusal to Give.—Substantially Given in Others.*—There is no prejudicial error in refusing an instruction which is substantially included in instructions given.

SUPREME COURT PRACTICE.—*Waiver.—Failure to Argue Question.*—Questions not argued in the appellate tribunal will be deemed waived.

INTERROGATORIES TO JURY.—*Conflicting Answers.*—If answers to inter-

rogatories to the jury are themselves conflicting, they can not be set up as in conflict with the general verdict.

NEW TRIAL.—*Admission or Rejection of Evidence.—Practice.*—Where a reason for a new trial is the exclusion or admission of evidence, the motion must point out with reasonable certainty the evidences excluded or admitted.

SAME.—*Newly Discovered Evidence.—Affidavits not in Record.—Supreme Court Practice.*—Where the affidavits in support of a motion for a new trial, on the ground of newly discovered evidence, are not in the record, no question thereon is presented.

From the Lawrence Circuit Court.

B. K. Elliott, W. F. Elliott and *M. F. Dunn*, for appellants.

W. H. Martin and *J. E. Boruff*, for appellee.

HACKNEY, J.—The appellee sued the appellants for personal injuries sustained while in the employment of the appellants, and from a swinging saw in appellant's lumber mill. The complaint was in two paragraphs, which differed in no material respect. The theory of the action was that the appellants negligently maintained said saw with worn and defective rigging, which broke and caused said saw to swing against the appellee without his negligence. It is alleged that the appellants knew of the defects, and that the appellee had no knowledge thereof, and could not observe the same because concealed behind and obstructed by the frame in which said saw was made to revolve.

In the presence of these allegations the complaint is sufficient to withstand the objection that the appellee had equal opportunity with the employer to have observed such defects; the allegation of the employer's knowledge and the absence of appellee's knowledge includes actual and constructive or imputed knowledge. *Evansville, etc., R. R. Co.* v. *Duel*, 134 Ind. 156.

As alleged in the complaint, the saw was set in a frame swinging from above, and in its use was pulled forward

by the man in charge. When the timber was severed the operator released the frame and it was drawn backward and upward by a rope fastened to the frame and with a heavy weight attached. The saw, when pulled through the timber, operated in an opening in the top of a table. When the defective rope parted, the frame swung forward, and the revolving saw struck and maimed the appellee.

The complaint alleged that appellee's duty required him to be "almost directly in front of" the saw so operating. The appellants moved the court to require a more specific allegation as to where the appellee was required to stand when engaged in managing said saw. This the court denied, and much is said in appellant's brief of this ruling. The complaint did not involve the pulling of the saw upon the appellee, who may or may not have been standing in front of it in the performance of his duties. It is manifest that he stood in front of the opening in the table at the time the saw struck him, and, if he was justified in relying upon the proper repair of the rope, he was in a place where he had a right to be, and ordinary care would not require precision in estimating the distance at which he should stand when the saw was not in motion, and when he could reasonably suppose it to be securely held in place by the rope and weight. In the absence of knowledge, actual or imputed, the employe may rely on the performance of every duty owing by the master to his servants. Upon the theory of the complaint, it would not have been contributory negligence to have gone in front of the opening in the table, and more specific allegations could not have weakened the complaint, and were certainly not essential to advise the defense of the cause of action they were called upon to defend.

Complaint is made of the second and third instructions

given by the court at the request of the appellee. They charge the duty of the master to supply reasonably safe places and machinery for the discharge of the servants' duties, the assumption, by the servant, of the ordinary hazards of his service, and the obligation of the master to use vigilance to protect his servants against unusual and extraordinary perils.

It is urged against these instructions that they are "one-sided, and utterly ignore the true principle governing the relationship existing between employer and employe;" that they "place the entire *onus* upon the master, and require no reciprocal duty of the servant."

We have quoted the argument of counsel, and feel constrained to suggest that it is too general and indefinite to give us that assistance desired, and we have been unable to discover substantial objections to either of such instructions. The obligations of the master, so charged, are thoroughly established and well recognized by the decisions of this court. *Cincinnati, etc., R. W. Co.* v. *Roesch*, 126 Ind. 446; *Brazil, etc., Coal Co.* v. *Young*, 117 Ind. 520; *Indiana Car Co.* v. *Parker*, 100 Ind. 181.

As one of the elements of damage for which recovery was proper, the court instructed the jury that they should consider "any temporary or permanent disability, either physical or mental, from which you find him suffering as the result of such injury." The appellants except to this instruction as including mental disability, such disability not being specially alleged as an element of damage. Any natural and direct consequence of an injury is not a matter of special damage, and recovery may be had therefor without special allegations. *Wright* v. *Compton*, 53 Ind. 337; *Fisher* v. *Hamilton*, 49 Ind. 341; *Cox* v. *Vanderkleed*, 21 Ind. 164; *Taber* v. *Hutson*, 5 Ind. 322; *Morgan* v. *Kendall*, 124 Ind. 454; *Ohio, etc., R. R. Co.* v. *Hecht*, 115 Ind. 443. Taking the language of the entire

charge, we can not believe that the court intended, or that the jury understood the language above quoted to distinguish between mental suffering and an impaired mind, or insanity, and to apply the rule of recovery to the latter.

Of the instructions asked by the appellants two are as follows:

"5th. The law as to the master is that in the supplying of materials, appliances, and machinery, he is held to ordinary care, and if unavoidable accident, accidents growing out of hidden defects, or accidents or injuries arising out of the use of machinery where the means of knowledge as to the dangerous character and condition of such machinery are equal on both sides, that is to say, where the employe has equal knowledge with the master as to the condition and character of the machinery he operates, there can be no recovery by the servant."

"6th. If you find in this case that the defendant Chaplin exercised ordinary care in the construction of the swinging saw and frame in complaint mentioned, and you find that the plaintiff's knowledge of the danger in operating the same, and of the condition and character, was equal with defendant's knowledge, then you must find for defendant."

The first of these instructions was given, and the second was refused, and of such refusal the appellants complain. It is asserted that the proposition contained in the instruction numbered six is not included in any charge given by the court, but we think it so certain that instruction numbered five contains the same principle, stated with equal clearness and precision, that no more than the presentation of the two instructions is necessary.

Following the argument upon the instruction so refused, appellants' brief continues as follows: "With

equal confidence, and without argument, because the instruction is its own best defender, we call attention to instruction number ten, which the court refused to give." It is a familiar rule of practice that questions not argued in this court are deemed to be waived. The burden of searching the record for evidence upon which to predicate the instruction, and of collecting the authorities to support the legal proposition contained in the instruction rests upon the appellants, and can not so easily be cast upon the court. The presumption of the correctness of the trial court's action prevails until the appellants demonstrate the error of such action. No error is suggested by this quotation from appellants' brief.

With the general verdict the jury returned special interrogatories and answers thereto, and upon such answers the appellants moved for judgment in their favor, notwithstanding said general verdict.

In argument, counsel submit two propositions, claimed to have been specially found, and to have been in irreconcilable conflict with the general verdict, the first of which propositions is that the appellee had equal opportunities with those of the appellants to know of the worn and defective condition of the rope by which the saw frame was suspended, and the second of which propositions is that the appellee was negligent in failing to stop the rotations of the saw before passing in front of the groove, or opening, in the table through which the saw was guided when in use.

By the first, fourth, eleventh and sixteenth interrogatories and answers thereto, the jury find that if the appellee had examined he could not have seen all parts of the machine, its ropes, pulleys, and appliances, or the defects therein, and did not have equal means of knowledge with the appellants, as to the character and danger of said machine. By the fifth interrogatory and

answer it was found that there was nothing "about the machine and its ropes or appliances that plaintiff could not have seen at any time and any hour of the day during his employment had he looked and examined."

The conflict in the special interrogatories in this respect is manifest, and not being capable of reconciliation can not be set up as in conflict with the general verdict in favor of which all reasonable presumptions are to be indulged. *Board, etc.*, v. *O'Connor*, 137 Ind. 622; *Gates* v. *Scott*, 123 Ind. 459; *Kirkpatrick* v. *Reeves*, 121 Ind. 280; *Chicago, etc., R. R. Co.* v. *Ostrander*, 116 Ind. 259; *Wabash R. W. Co.* v. *Savage*, 110 Ind. 156; *Grand Rapids, etc., R. R. Co.* v. *McAnnally*, 98 Ind. 412.

Upon the second of the propositions stated, the jury found that connected with said saw rigging was a lever which could be used to stop the rotations of the saw, and that such lever was within the convenient reach of the appellee before he passed in front of said saw; that though he knew of the presence and purpose of said lever, he did not use the same. Do the facts so found necessarily raise the presumption of negligence in failing to employ the lever and stop the rotations of the saw when held at a safe distance from the appellee by such means as we have said he might reasonably presume to be safe? We are not advised that it was not the custom to permit the saw to continue in motion when released, and drawn back by the weight and pulley; nor can we say that it was ordinarily an unsafe practice to permit it. While it would appear that the safety of the operation would be more secure by the stopping of the saw, we are not advised of any rule or custom which would suggest that it was imprudent to rely upon the efficiency of the pulley, the weight and attachments to withhold the saw in safety. As we have already said, if he was justified in relying upon the efficiency of the rigging to hold the

saw in place, it would not be necessary, in the exercise of ordinary care, to employ more efficient means of protection from injury. From any information that we have, it can not be said that such delays would not have attended the stopping of the saw, as to have made it impracticable to apply the lever each time that the saw frame was suspended. If every reasonable presumption is indulged in favor of the general verdict, we can not say that it was practicable to have stopped the saw, under the circumstances, and conflict between the general verdict and the special findings in this respect is not apparent.

The sixth cause assigned for a new trial in the circuit court was the admission in evidence of "statements by Daft, the millwright, and Frank Marvin, foreman, as to the condition of the machine and the procurement of a new rope for such machine."

As a part of this assignment is a document entitled "Bill of Exceptions No. 1," which recites that the plaintiff, Joseph Fields, and Mrs. Fields, his wife, were witnesses in his behalf, and, as such, testified to conversations of said Daft and Marvin, by the express consent of the appellants, neither the character nor substance of such conversations being shown; that Mrs. Ramsey was a witness for the plaintiff, and was permitted, over appellants' objection, "to testify and state declarations made by Marvin, foreman, and Daft, millwright, after the alleged injury, as to the cause of the injury, and the condition of the rope and the procurement of a new rope."

The declarations so testified to do not appear in said bill of exceptions, their character is not more fully shown by the motion for a new trial, and counsel do not cite us to the record indentifying such evidence. The alleged

bill of exceptions is not shown by the record to have been filed, and it is not in the record except as it is so copied in the motion for a new trial. It does not, therefore, supply any evidence of its contents. *Johnson* v. *State*, 65 Ind. 269.

It has long been an established rule of practice that the motion for a new trial must point out with reasonable certainty the evidence admitted or excluded, and of which complaint is made, and that a failure to do so will forfeit any error in such ruling of the trial court. *Evans* v. *State*, 67 Ind. 68; *Coryell* v. *Stone, Exr.*, 62 Ind. 307; *Grant* v. *Westfall*, 57 Ind. 121; *Betson* v. *State, ex rel.*, 47 Ind 54; *Bowers* v. *Bowers*, 53 Ind. 430; *Holding, Admr.*, v. *Smith*, 42 Ind. 536; *Reeves* v. *Plough*, 41 Ind. 204; *Louisville, etc., R. W. Co.* v. *Thompson, Admr.*, 107 Ind. 442; *Staser* v. *Hogan*, 120 Ind. 207.

In the last of these cases it was said: "Causes for a new trial must be assigned with clearness, certainty, precision and particularity."

The motion before us does not comply with this requirement in any respect.

The duty of counsel is not complete when he fails to point out the evidence offered or excluded, so as to enable this court to verify the cause assigned in the motion, by proper references to the record. Here we have no means of ascertaining what evidence was admitted without searching the entire record. The labors of the court are sufficiently onerous without assuming the duties of counsel. We hold, therefore, that no question is presented by the sixth cause for a new trial.

It is finally contended that the motion for a new trial should have been granted on the assignment of newly discovered evidence. Such evidence is presented by affidavits filed as exhibits with the motion. These affidavits are not in the record by bill of exceptions, and,

for that reason, can not be entertained. *Berlin* v. *Oglesbee*, 65 Ind. 308; *Johnson* v. *State*, *supra*; *McDaniel* v. *Mattingly*, 72 Ind. 349; *Wood* v. *Crane*, 75 Ind. 207.

Having found no error in any of the rulings of the trial court, properly presented for review, the judgment is affirmed.

Filed Feb. 20, 1894; leave granted to withdraw petition for rehearing May 10, 1894.

No. 16,733.

138	67
147	582
138	67
150	93

TAYLOR *v.* CALVERT ET AL.

GUARDIAN AND WARD.—*Guardian Buying Certificate of Purchase.—When Held in Trust.*—Where it is the duty of a guardian to protect his wards' interest by buying a certificate of purchase, and he makes the investment for himself, he will be held as their trustee, and all benefits derived from such purchase will inure to the benefit of the wards.

SAME.—*Guardian Assuming Position Antagonistic to Wards' Interest.—When Held a Trustee.—Reimbursement.*—Wherever a guardian assumes a position in relation to his wards' funds, by which he puts his personal interest in conflict with theirs, or acquires any interest or title adverse to that of his wards, he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards, and he will hold what he has acquired, in trust for them, subject only to his right to be reimbursed for what he has invested.

SAME.—*Mortgage Deed Held by Guardian.—Junior Lien Held by Wards.—Right to Redeem.*—Where a guardian purchases a certificate of sale of lands on a senior lien, on which his wards hold a junior lien, and takes a deed therefor in his own name, in the nature of a mortgage, for the purpose of holding it as additional security for the money advanced by him in the purchase thereof, until such time as he might repay himself out of the funds of his wards, but in his final report and settlement he made mention of the certificate and deed, but took credit for the junior mortgage, which he turned over to his wards, the wards have a right to have the deed to the guardian set aside and to redeem from said sale. The fact that the guardian at

no time had sufficient funds of his wards with which to reimburse himself for the purchase-money, could not preclude the wards from redeeming, nor could it defeat a constructive trust.

SAME.—*Right of Wards to Redeem.—Tender of Redemption Money.—Rents and Profits.*—And in such case it is unnecessary to allege that the redemption money was tendered to the guardian, where it is alleged that he has been more than paid by the rents and profits by him received.

SAME.—*Final Settlement.—When does not Preclude Right of Wards to Redeem.—Res Adjudicata.*—In such case, the wards were not precluded from their right to redeem, by the judgment of final settlement, such matter not being involved in the final settlement, and it not being necessary to set aside such report before proceeding to redeem.

SAME.—*Arrangements Between Guardian and Ward Soon after Ward Becomes of Age.*—The conduct and all arrangements between guardian and ward soon after the ward has become of age will be closely scrutinized.

STATUTE OF LIMITATIONS.—*Guardian and Ward.—Constructive Trust.—Action to Enforce.*—An action to enforce a constructive trust growing out of a fiduciary relation (guardian and ward), the act (the claim of adverse title) complained of being poisonous in its consequences, the suit can only be barred by the fifteen years' statute of limitations, which would begin to run when the guardian was discharged from his trust and began to claim title absolute in himself adversely to the trust.

VARIANCE.—*Complaint and Proof.—When Immaterial.*—A variance between the complaint and the evidence is immaterial where the complaint might have been amended so as to cure it, after the evidence was all in; and such amendment will be presumed.

EVIDENCE.—*Value of Rents and Improvements.—How Proven.*—Where the facts sought to be elicited is the rental value of lands and the value of improvements, the proper test is, on the one hand, what was the rent of the place really worth? and, on the other, what is the reasonable value of the improvements made? Not what rent was actually received, and what the improvements cost.

SAME.—*Offer to Prove.—Specific Statement.*—An offer to prove will not be available unless the facts sought to be elicited are specifically stated.

NEW TRIAL.—*As of Right.—When not Demandable.*—A new trial as of right is not obtainable where the cause proceeded to judgment on the entire complaint against the defendant, as to one of the paragraphs of which a new trial as of right was not demandable; notwithstanding such an issue was raised by the cross-complaint, to which the judgment makes no reference.

From the Greene Circuit Court.

A. G. Cavins, *E. H. C. Cavins* and *W. L. Cavins*, for appellant.

W. W. Moffett and *C. E. Davis*, for appellees.

DAILEY, J.—This is an action brought in the court below by the appellees against the appellant and James R. Hodges and Louisa M. Hodges, his wife, in two paragraphs, based upon the following state of facts: On March 23, 1874, the appellant Robert R. Taylor was appointed guardian of John I. and Mathew H. Calvert, as successor to James R. Hodges, whose bondsmen were insolvent. Hodges had converted the larger portion of his wards' funds, but executed to Taylor a note and mortgage on his only remaining farm or property as security for $711 of the money, and included in the mortgage a $200 note due to Taylor. This farm was, at the time, worth $2,000. When the mortgage was given there was in the hands of the sheriff of Greene county an execution against James R. Hodges, which was soon after levied upon the land. Sale was duly made on this execution to one Isom Sanders, who, a short time before the year for redemption expired, sold the certificate of purchase to the appellant, Taylor. Up to that time Taylor had taken no steps to procure funds with which to redeem from said sale, or in any way to protect the mortgage of his said wards, but he afterwards reported to the court that he had bought the certificate of purchase, thinking he might save something for his wards out of the land. It does not appear that he ever afterwards took any steps to in any way use said certificate to save anything for his wards; but, on the contrary, after his wards became of age, asserted title in his own name to the land. When Taylor settled with his wards, he turned over to them the notes and mortgage and took credit for

the same. When settling with Mathew, the last one of the wards, Taylor told him he could do nothing with the mortgage until Hodges died leaving his wife surviving, when he could foreclose the mortgage against her third of the land. Taylor has ever since held possession of the tract, enjoying the rents and profits.

Before the beginning of this suit John I. Calvert died, leaving his widow, now Mrs. Johnson, and the other defendants herein, except Mathew, his only heirs. There was no administration on his estate and he left no debts unpaid.

It is alleged in the first paragraph, that Taylor took the certificate of purchase in trust for his said wards, and avowedly for their benefit; that John I. Calvert arrived at the age of twenty-one on January 1, 1879, and Mathew H. Calvert became of age in December, 1881; that thereafter said Taylor repudiated the trust, and continues to hold said real estate and to receive the rents and profits thereof of the value of $3,500, and now holds possession of the real estate and denies appellees' right thereto. Appellees demand that after deducting amounts paid by appellant for rents they have judgment for the residue of rents and profits, a decree vesting title in them, a foreclosure against said James R. and Louisa M. Hodges, and all other proper relief.

The second paragraph of the complaint directly alleges that Taylor took the certificate of purchase to protect his wards' mortgage and equity of redemption in the land, but failed to redeem the same by paying himself out of his wards' money, but when the year expired took a deed in his own name, for the purpose, however, of holding the same, and promising to hold said deed as an additional security to him for money by him advanced in the purchase of the certificate until such time as he might be paid out of their funds, but though he had sufficient

money of theirs thereafter did not redeem for them, but continued to hold said deed and certificate as security until his wards became of age, when he turned over to them the mortgage and notes, and settled with them without mentioning to the court the existence of said certificate; that said mortgage and notes are the property of the plaintiffs, and are yet unpaid; that defendant Taylor has had possession, appropriating the rents and profits to his own use, and has been fully reimbursed for all the money by him invested in said certificate of purchase; that said appellant made no mention of said certificate of purchase or deed or said real estate in either of the final reports as to said wards, but took their respective receipts for and made assignment to them respectively of their interests in said mortgage and note, and took credit therefor in his final reports; that said Taylor was finally discharged as guardian on January 10, 1883.

Prayer that the deed be set aside as to the appellant, and that the appellees be allowed to redeem and foreclose against said Hodges and Hodges, and for all other proper relief.

The defendants, James R. Hodges and Louisa M. Hodges, filed their answer to the complaint, disclaiming any interest in the real estate described in the complaint, or in the controversy involved in the issues tendered. Subsequently the appellant filed a demurrer to the complaint and each paragraph thereof, which was overruled and appellant excepted. Appellant then filed an answer in four paragraphs as follows:

1st. A general denial.

2d. A fúll statement of the facts in relation to all matters set out in the complaint, his final settlement as guardian and his discharge.

3d. The statute of limitations of six years.

4th. The statute of limitations of fifteen years.

In the 2d, 3d and 4th paragraphs, appellant answers the complaint except as to the inchoate interest in the land of Louisa M. Hodges. Appellant also filed a cross-complaint in two paragraphs. the first of which was afterwards withdrawn. The second paragraph of cross-complaint was to quiet title to the real estate in controversy in appellant. Appellees demurred to the 2d, 3d and 4th paragraphs of answer, and each paragraph of cross-complaint. James R. Hodges and Louisa M. Hodges filed a disclaimer to the cross-complaint of the appellant. The court sustained the demurrer to the third paragraph of appellant's answer, and appellant excepted, and the court overruled the demurrer to the 2d and 4th paragraphs of answer, and the second paragraph of cross-complaint to which the appellees excepted. The issues were closed, there was a trial by the court, and finding and judgment in favor of appellees against the appellant, decreeing that appellees were the owners of the real estate in controversy. There was a motion for a new trial by appellant, which was overruled and exception taken, and sixty days were given in which to file bills of exceptions. There was a motion for a new trial as of right under the statute, which was also overruled by the court, and exception taken by the appellant. Appeal to this court was prayed and granted, and the following errors assigned:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2d. The court erred in overruling the demurrer to the first paragraph of the complaint.

3d. The court erred in overruling the demurrer to the second paragraph of the complaint.

4th. The court erred in sustaining the demurrer to the third paragraph of the answer.

5th. The court erred in overruling the motion to strike out the second paragraph of the reply.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in overruling the motion for a new trial as of right under the statute.

The first three specifications of error raise one question, the sufficiency of the complaint and each paragraph thereof. The first paragraph of the complaint is not, as the learned counsel for the appellant contend, drawn upon the theory of a resulting or implied trust arising from the fact that the money of one is used, and the title taken, in the name of another. The theory of this paragraph is that of a constructive trust growing out of a constructive fraud, or the violation of duty in a fiduciary relation. As we understand it, the appellees in this paragraph of the complaint present the theory that when Taylor, as their guardian, held the Hodges mortgage, he could not assume in relation to the land mortgaged any position in conflict or inconsistent with their interest, without first resigning his trust. He could not represent them in holding the mortgage, and represent himself in holding an adverse lien, the certificate of purchase. As he did assume to purchase the certificate which was adverse and superior to the mortgage due the wards, the purchase would inure to their benefit, and he would be adjudged to hold the certificate as their trustee; and that too, whether he bought it with his own money or theirs; the only difference being that in the absence of actual fraud he would, if he invested his own money, be entitled to be reimbursed. The theory of this paragraph assumes that it can make no difference whether there was any fraud intended or not, nor whether Taylor designed from the beginning to hold the certificate for himself or avowedly for the protection of his wards. In

other words, whether he intended to take the certificate in trust, or to take it for himself, the law will construe it to be held in trust for, and it will inure to the benefit of, his wards in whose interest his fiduciary relation compelled him to act, if he acted at all in the matter. The theory of the complaint assumes, further, that for all money invested by Taylor he has been fully compensated by rents and profits. It is true, as a general proposition, that a trust can only result where the beneficiary's money has been invested; but the doctrine applies to person's "dealing at arm's length," and by no means conflicts with the principle of constructive trusts growing out of constructive frauds in fiduciary relations, which is an entirely different branch of the law. In 1 Story's Equity, section 258, it is said: "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet by their tendency to mislead or deceive other persons, or to violate private or public confidence, or to injure * * public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same * mischief as acts and contracts done *malo animo*." In section 259, the author says: "Some of the cases under this head are principally so treated because they are contrary to some general public policy or to some fixed artificial policy of the law. Others again rather grow out of some special confidential or fiduciary relation between all the parties, * which is watched with special jealousy and solicitude because it affords the power and the means of taking undue advantage or of exercising undue influence over others." In section 307, it is said: "Courts of equity will therefore * * often interfere in such cases, where but for such a peculiar relation they would either

abstain wholly from granting relief or would grant it in a very * abstemious manner."

It is also said: Generally stated, the doctrine governing all fiduciary relations, such as attorney and client, parent and child, principal and agent, trustee and *cestui que trust*, guardian and ward, and like relations, is that whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. 1 Story's Equity, section 323; *Roby* v. *Colehour*, 25 N. E. Rep. 777.

"So if an agent employed to purchase for another purchases for himself, he will be considered as the trustee of his employer." 1 Story's Equity, section 316.

Similarly, it might be stated that where it is the duty of a guardian, as it was Taylor's in this case, to protect his wards' interest by buying the certificate of purchase, and he made the investment for himself, he should be held as their trustee. So, where, if a person is employed as an agent to purchase a debt of his employer, he can not buy it upon his own account. The same rule applies to a surety who purchases the debt of his principal. So, if an agent discover a defect in the title of his principal to land, he can not misuse it to acquire title in himself. If he do, he will be held a trustee for his principal. Section 316, *supra*.

So, a trustee will not be permitted to obtain any profit or advantage to himself in managing the affairs of the *cestui que trust*, but whatever benefits or profits are obtained will belong to the latter. In short, it may be laid down as a general rule that a trustee is bound not to do anything that will place him in a position inconsistent with the interest of the trust, or which may have a tendency to interfere with his duty in discharging it. And

this doctrine applies not only to trustees strictly so called, but to other persons standing in like situations. Executors and administrators, for instance, are not permitted to purchase up the debts of the decedent on their own account, but whatever advantage is thus derived by them, by purchases at an under value, is for the common benefit of the estate. 1 Story's Equity, section 321; *Cushman* v. *Bonfield*, 28 N. E. Rep. 937.

It is an inflexible rule that where the trustee buys at his own sale, the *cestui que trust* may treat the sale as a nullity, though the trustee paid a fair price, not because there is, but because there is likely to be, fraud. Bigelow on Frauds, p. 244.

On page 242, the author says it is a general rule which obtains in respect to trustees of every description and of tenants for life, that if from being in possession they have and improve an opportunity of renewing a lease, whatever advantage they obtain by such means, they must hold in trust. Equity treats all such transactions as poisonous and vicious, without reference to the motive that induced the act. Where one is interested as a partner of the owner of land in the profits of its sale, and who is also the attorney and legal adviser of such owner, buys in the title at execution sale, he holds the title so acquired in trust for himself and his partner. *Roby* v. *Colehour*, *supra*.

The same principles are recognized by this court, and enforced without modification. *Potter* v. *Smith*, 36 Ind. 231; *Wilson* v. *Brookshire*, 126 Ind. 497.

In the latter case, on page 501, the court express the principle underlying the case at bar, in these words: "By accepting the trust and entering upon its performance, Wilson assumed such a relation to the property in controversy that he became disqualified from acquiring any right in it hostile to those in whose behalf he was

acting, without their consent. And this was so whether he contemplated any fraud upon them or not. * * He could not, while standing in the relation of trustee, acquire title to the trust property."

In *Potter* v. *Smith, supra*, it is said: "The cases are uniform in declaring that it matters not how innocent and *bona fide* and free from suggestion of fault the transaction may be, nor how harmless or even beneficial the interference of the trustee may have been, the trustee can never, by his own act, shake off the equity of the *cestui que trust* to have the benefit of all that he does in the scope of the trust."

On page 240, it is said, in substance, that when the trustee is reimbursed as vendee, he can not equitably claim any more.

In Story's Equity, section 317, in speaking of the relation of guardian and ward, it is said: "In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency." We cite 8 Am. and Eng. Encyc. of Law, p. 647, also note p. 648; Bigelow Fraud, p. 250; 9 Am. and Eng. Encyc. of Law, p. 105, note 4; 2 Pom. Eq. Jur., section 956.

From these authorities we may safely deduce the principle of law that whenever a guardian assumes a position in relation to his wards' funds, by which he puts his personal interest in conflict with theirs, or acquires any interest or title adverse to that of his wards, he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards, and he will hold what he has acquired, in trust for them, subject only to his right to be reimbursed for what he has invested. Under this purchase, Taylor held the land in suit in trust for his wards, subject to his vendee's lien thereon. It is true, they had no title

to the land when Taylor bought the certificate, but they had a lien on it. It was the guardian's duty to make good this lien if he could, and, if need be, to take steps to ripen it into a title by foreclosure, and when he bought an adverse and senior lien, he put himself in a place where it was to his interest to prevent a redemption from the certificate, or a foreclosure of the wards' mortgage.

By making proper application to the court he could have been empowered to borrow money for the wards, if he did not have sufficient of their funds with which to buy in the certificate of purchase for them, and thus prevent the loss of the junior lien. *Ray* v. *McGinnis, Guar.*, 81 Ind. 451.

But the purchase by Taylor of the certificate for himself put him in a position where he could not take this step without depriving himself of the investment he had made in the purchase of the certificate, which gave him an opportunity to acquire a $2,000 farm for $700. In this we assume that the allegations of the complaint are to be taken as showing no intention or promise by the guardian to hold the certificate for his wards, which is the construction contended for by appellant's counsel. But we think the first paragraph of the complaint shows it was the intention of Taylor to purchase the certificate for the benefit of his wards from the very beginning, and, if so, the equitable title would be as much theirs as if they had bought it for themselves. If he invested any of his own money in the transaction, he would be entitled to have it refunded.

The first paragraph of the complaint alleges that he has been paid in rents and profits a sum more than adequate to pay him. We think this paragraph is sufficient to establish and enforce a trust against Taylor, because of the fiduciary relation which he sustained and his con-

duct in that relation. Appellant contends there is no allegation showing that appellees have not received all the money ever due them, nor that they have not received the money on the note. In this they are mistaken. The complaint shows that the note was delivered to the wards and is now owned by them. But it could make no difference whether the wards had received the money on the note or not; for, if the certificate of purchase was theirs in the beginning, it would remain theirs, and the benefits derived would continue, notwithstanding they might, from other sources, have received the money on their mortgage.

The theory of the second paragraph of the complaint is not to enforce a trust in the land. It proceeds on the theory that Taylor holds, unless it be paid, a senior lien upon the land, and that the plaintiffs hold a junior mortgage lien. They ask an order permitting them to redeem, if anything is found remaining unpaid on the certificate of purchase or deed, and pray for a foreclosure against Hodges and wife. It presents the theory that Taylor's certificate and deed did not become in fact, and never has been, anything more than a lien, which he held as security, and not as evidence of title, until after he settled with these wards. Its allegations recite the facts as in the first paragraph, showing the existence of the two liens down to the point where it sets out the purchase of the certificate by Taylor. Then the paragraph reads as follows: "And on the 2d day of April, 1875, before the year for redemption from said sale had expired, and while said Taylor had more than $600 of the funds of said wards in *his* hands, he purchased of said Sanders the certificate of purchase which had been issued to him by the sheriff to evidence said sale; that he purchased and took the same to protect the mortgage and security of his wards in said lands, and so held the same,

but failed to redeem by paying to himself the money of said wards to that amount, or by paying it to any one having the right to receive it; that when said year for redemption had expired said Taylor took in his own name the sheriff's deed for said lands for the purpose of holding it as additional security for the money advanced by him in the purchase thereof, and promised and agreed so to do until such time as he might repay himself out of the funds of said wards."

These allegations show that Taylor never took the deed to acquire the title, but simply as a lien in the nature of a mortgage, and, if so, any junior lien-holder, with whom Taylor had so agreed, would have the right to redeem, whether he was Taylor's ward or not.

The second paragraph of the complaint further states that Taylor, in his final settlement with the court, made no mention of this certificate or of the $200 included in the mortgage and made payable to himself, but took credit for the junior mortgage, which he turned over to his wards, and that plaintiffs are now owners of said note and mortgage; that the note is lost but due and unpaid, a copy of the mortgage is filed as an exhibit; that Taylor has had possession, receiving the rents and profits to the amount of $3,500, and is more than reimbursed for all the money he has invested in the premises. This paragraph closes as follows: "Wherefore plaintiffs ask that said deed be set aside, and they be allowed to redeem from said sale, and that an accounting be had and the amount ascertained, with interest that said Taylor, of his individual funds, paid for said certificate of purchase and deed, and the amount of said rents and profits, and if any balance *is* found due said Taylor on his certificate, that the court fix the time in which they shall redeem by paying the same; that said mortgage be foreclosed against said Hodges and wife and for all other

proper relief. We think the complaint was good for that purpose. *Butt* v. *Butt*, 91 Ind. 305; Thornton & Ballard's Pr. Code, section 768, note 1.

It was unnecessary to allege that any redemption money was tendered to appellant, for it was shown that he was more than paid by the rents and profits by him received. *Scheffermeyer* v. *Schaper, Guar.*, 97 Ind. 70; *Fitzgerald* v. *Kelso*, 71 Iowa, 731.

The 4th specification of error raises the question of the sufficiency of the third paragraph of the answer. It is a familiar rule of pleading that an answer must, to be sufficient, be good to all of the complaint which it purports to answer, or it will be demurrable, although it may be good to a part thereof. 1 Works' Prac., section 588; *Frazee* v. *Frazee*, 70 Ind. 411; *Smith* v. *Little*, 67 Ind. 549.

The six years' statute of limitations is probably good to the demand for rents and profits, but not to the remainder of the complaint. The rule also renders bad an answer to a whole complaint in more than one paragraph, when the answer is good as to one and but one of the paragraphs of the complaint. *Allen* v. *Randolph*, 48 Ind. 496; *Musselman* v. *Cravens*, 47 Ind. 1; *Towell* v. *Pence*, 47 Ind. 304; *Alvord* v. *Essner*, 45 Ind. 156.

If it were true that the action to enforce the trust set out in the first paragraph of complaint were answered by the six years' statute of limitations, the answer, since it purports to respond to the whole complaint in both paragraphs, would be demurrable, because it is clearly not a good answer to the action to redeem set out in the second paragraph of the complaint; for a suit to redeem may be brought at any time within fifteen years after the cause of action accrues. *Barr* v. *Vanalstine*, 120 Ind. 590.

This being an action to enforce a constructive trust growing out of a fiduciary relation, the act complained of is poisonous in its consequences, and the suit can only be barred by the fifteen years' statute of limitations. Thornton & Ballard's Prac. Code, note to section 294; *Albert* v. *State, ex rel.*, 65 Ind. 413; *Potter* v. *Smith, supra; Wilson* v. *Brookshire, supra.*

The fifteen-years' statute would not begin to run until Taylor was discharged from his trust and began to claim title absolute in himself adversely to the trust. Works' Prac., vol. 1, section 258; *Albert* v. *State, ex rel., supra,* on p. 420; Story's Equity Jurisp., section 1520; *Cutsinger* v. *Ballard,* 115 Ind. 93; *Thomas, Admr.*, v. *Merry,* 113 Ind. 83.

In discussing the error specified for overruling the motion for a new trial, counsel urge that the evidence does not disclose that the guardian at any time had sufficient funds of his wards with which to pay himself for the certificate. In our opinion this is not material, as it would not preclude the beneficiaries from redeeming now, if the evidence otherwise sustained the second paragraph of the complaint, nor would the want of such funds defeat a constructive trust if the averments of the first paragraph of complaint are otherwise supported by the evidence. It appears that the certificate cost $499, the mortgage, as stated, was for $711 to appellant as guardian, and $200 to him individually. As to the latter amount, if the land had been sold at any time to pay the liens, it must have been held as junior to the other claim, for the obvious reason that Taylor could not, while guardian, secure a debt to himself by in any way impairing a security which he was taking for his wards; and if he secured his own funds with the same mortgage with which he protected his trust fund his lien would be postponed to it.

The complaint charges that the land was worth $4,000. The evidence amply shows it to have been worth $2,000 at the time the appellant was guardian. This indicates that, by taking the proper steps, Taylor could easily have realized enough to pay all the liens that were against the property.

It is contended by counsel that the evidence of the final settlement of Taylor is conclusive in his favor upon every point made by the complaint. We do not so understand the law. It can not be fairly asserted that when the guardian was allowed to turn the $711 note and mortgage over to his wards and take full credit therefor, the wards would, by the judgment of final settlement, be estopped from redeeming from the liens held by Taylor individually. Such settlement would imply that the notes turned over were of some value and carried with them the right to redeem from precedent liens, no difference by whom they were held, even if the wards did not possess the equitable title to the real estate. If, on the contrary, the equitable title was in the wards, the question whether Taylor should be required to transfer the legal title to them, at the time of the settlement, was in no way involved in the final report. Especially is this true when it made no mention of the legal title, and all that was required of the guardian in such report was to report as to the management of the land and account for the rents and profits.

It is a well settled rule that matters not involved in the final settlement report of the guardian are not adjudicated therein, and it is not necessary to set aside such report in order to attack the transaction. *Wainwright* v. *Smith*, 106 Ind. 239; *Naugle* v. *State, ex rel.*, 101 Ind. 284.

Appellant claims that as to Mathew H. Calvert there was an acquiescence in all that Taylor had done, with

full knowledge of all the facts after the *cestui que trust* had arrived at the age of twenty-one years. Upon this point the evidence of Taylor and Calvert are in direct conflict. But counsel do not seem to question the statement of Calvert that when he asked Taylor what he had in the land Taylor told him he could do nothing with the mortgage until James R. Hodges died; that the judgment was ahead of the mortgage. This was plainly an evasion of the ward's rights in the premises. Such conduct and all arrangements between guardian and ward so soon after the ward became of age will be closely scrutinized. 1 Story's Equity, section 317; Bigelow on Fraud, p. 252.

The complaint alleges that the judgment on which the certificate of purchase was issued was taken in Monroe county, while the evidence shows it was rendered in Greene county. This was an immaterial variance; the complaint might have been amended to cure it after the evidence was all in; and this court will presume that the amendment was made. *White* v. *Stellwagon*, 54 Ind. 186; *Chaney* v. *State, ex rel.*, 118 Ind. 494; *Ke-tuc-e-mun-guah* v. *McClure*, 122 Ind. 541; *Watt* v. *Pittman*, 125 Ind. 168.

The sixth reason for a new trial is based upon the exclusion of certain evidence of the defendant, Taylor, in his own behalf, as to the amount of rent he had received and the sums paid for improvements. That he was an incompetent witness against the heirs of John I. Calvert, seems to be conceded. *Malady* v. *McEnary*, 30 Ind. 273.

But it is claimed that the evidence was only offered against Mathew H. Calvert. It seems, from an examination of the record, that this limitation was only made as to the first question, and not to any of those which followed. The first question was objected to, as the rec-

ord shows, because it was not a proper way to prove the rental. Taylor might have received much less for the rents of the place than they were worth. So, with the second question, it called for the wrong criterion for determining the amount to be credited for improvements. The third question is open to the same criticism, and the further objection that it calls upon the witness for a calculation.

The true test in such a case as this is, on the one hand, what was the rent of the place really worth? and, on the other, what is the reasonable value of the improvements made? Not simply what rent was actually received, and what the improvements cost.

A party in possession, liable to account for rents and to receive credits for improvements, will not be permitted to let the place lie idle or to mismanage it, and then account only for the value of the rents actually received, but will be called upon to account for the reasonable rental value of the premises; nor will he be permitted to burden the premises with unnecessary or useless improvements, and charge therefor; hence the legal test of liability on the one side, and of compensation on the other, is, what is the reasonable rental value of the premises? and what the reasonable value of the improvements, considered as such, thereto? Furthermore, it is a rule of practice that offers to prove will not be available unless the facts expected to be elicited by the questions asked are stated to the court below at the time of making the offer to prove. Elliott's App. Proced., section 743.

The offer must be specific, a general offer will not be sufficient. *Over* v. *Schifling*, 102 Ind. 191; *Carskadden* v. *Poorman*, 36 Am. Dec. 145.

Appellant offered to prove, by Taylor, the amount of rent he had received from the place; also the amount he

had paid for improvements, and what was the annual value of the rents and profits after deducting the cost of the improvements.

It will be observed that none of these offers states specifically the amount of the rent, or the cost or value of the improvements proposed to be proved. These offers were, therefore, too general. They should, in each instance, have the specific amount which they expected the witness to fix in his testimony to be elicited by the question.

It is earnestly insisted by appellant's counsel that the court erred in refusing to grant him a new trial as of right, while appellees contend that the issues embraced causes of action on which a new trial as of right could not be demanded that each of the causes stated in the issues, except that embraced in the cross-complaint to quiet title, is one in which a new trial of right can not be required. As has already been said, the first paragraph seeks to have a trust declared and the legal title vested in the holders of the equitable title; the second paragraph asks that a lien be declared satisfied, and that plaintiffs be allowed to redeem from any balance that might be found remaining unpaid upon it. There were no allegations in either paragraph concerning the quieting of title. We think it clear that the second paragraph states no cause of action on which a new trial as of right is demandable. *Voss* v. *Eller*, 109 Ind. 260; *Shular* v. *Shular*, 56 Ind. 30.

The finding and judgment was to the effect not only that Taylor held the land in trust, but that both of his liens for the amount of the certificate and the $200 note were paid. The final judgment effectually adjudicated all questions affecting the rights of Hodges in the land, but contains no reference to the cross-complaint of Tay-

lor to quiet title. The cause proceeded to judgment on the entire complaint as against the appellant, and as one of the paragraphs contained a cause of action on which a new trial as of right was not demandable, the motion was correctly overruled. *Wilson* v. *Brookshire, supra,* at page 506.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed May 17, 1894.

No. 16,789.

JONES, TREASURER, ET AL. *v.* RUSHVILLE NATIONAL BANK ET AL.

138	87
137	694
137	698
138	696
138	700
138	87
141	137

TAXES.—*State Board of Tax Commissioners.—Jurisdiction.—Original and Appellate.*—The provisions of the statute conferring upon the State Board of Tax Commissioners the powers possessed by the county boards of review were intended to confer such powers in cases where it had jurisdiction, either original or appellate, and was not intended to confer original jurisdiction over all property in the State.

SAME.—*Illegal.—Action to Enjoin.—Bank.*—The fact that bank stock may be owned by private individuals, furnishes no reason why a suit may not be maintained by the bank to enjoin the collection of illegal taxes assessed against it.

PARTIES.—*Plaintiff.—Community of Interest.—Banks.—Taxes.*—Where two banks were assessed separately, and the tax assessed against the one does not affect the property of the other, and the relief to which the one is entitled, if granted, would not affect the other, they could not, in the absence of some community of interest, unite in a suit to enjoin the collection of such taxes.

From the Rush Circuit Court.

A. G. Smith, Attorney-General, and *J. Q. Thomas*, for appellants.

B. L. Smith, C. Cambern, W. A. Cullen and *J. D. Megee*, for appellees.

COFFEY, J.—This action was brought by the appellees, in the Rush Circuit Court, against the appellant as treasurer of Rush county, to enjoin the collection of a tax. The court overruled a demurrer to the complaint, and the appellant failing and refusing to answer further, the appellees had judgment as prayed on their complaint.

The complaint consists of one paragraph, and alleges, among other things, substantially, that the appellees are corporations legally organized under the banking laws of the United States; that they each made a sworn statement of the value of their property, and filed the same with proper officers; that they were each notified to appear before the county board of review on the 14th day of July, 1891, and show cause why said statements should not be revised and the valuation of their property increased; that they appeared before said board, and after hearing the evidence adduced, the board found said statements to be correct, and then and there found that the Rushville National Bank should be assessed ninety-three thousand three hundred and seventy-five dollars, and the Rush County National Bank eighty-seven thousand dollars; that said finding and assessment has never been revised or set aside, and no appeal has ever been taken from the action of the board of review; that afterwards both of said banks were notified to appear before the State Board of Tax Commissioners on the — day of August, 1891, and show cause why the valuation of their property should not be increased; that they appeared before said State Board and protested against its inquiring into the valuation of their property on the ground that no appeal had been taken from the action of the county board of review fixing the value of their property; and because said State Board had no jurisdiction to inquire into said matters; that thereupon the State Board of Tax Commissioners overruled the objec-

tions of the appellees, and increased the valuation of the Rushville National Bank twenty-nine thousand dollars, and of the Rush County National Bank twenty-eight thousand dollars; that the action of the State Board of Tax Commissioners is illegal and void because no appeal was ever taken from the action of the county board of review to said commissioners, and because said commissioners have no original jurisdiction in such cases. It is earnestly contended by the appellant that the decree in this case should be reversed:

First. Because the State Board of Tax Commissioners had original jurisdiction to fix the value of the property of the appellees for the purposes of taxation, and that having so fixed it they are bound by the valuation placed upon it by such board.

Second. Because the appellees are not the owners of the stock issued by the banks, and that for this reason the suit should be prosecuted by the owners of the stock, and not by the banks.

Third. Because there is a misjoinder of parties plaintiffs.

Section 114 of an act of the General Assembly, approved March 6, 1891 (Acts 1891, p. 199), creates a county board of review consisting of the county assessor, county auditor, and county treasurer.

Among other powers conferred, it confers upon such board power to equalize the valuation of real and personal property, and to correct any list of valuation as it may deem proper. It also has power to equalize the valuation made by assessors, either by adding to or deducting therefrom such sums as are necessary to fix the assessment at its true cash value. It may, after the notice provided for in the act, on cause shown, or on its motion, correct the assessment or valuation of any property in such manner as will, in its judg-

ment, make the valuation thereof equal, and may, to that end, examine under oath, any person touching such matter.

Section 125 of the act provides for appeals from the county board of review, to the State Board of Tax Commissioners.

Section 129 provides that the State Board of Tax Commissioners shall have all the powers conferred by the act upon county boards of review.

It is earnestly and ably contended by the appellant, with much plausibility, that these several sections of the statute, when construed together, confer upon the State Board of Tax Commissioners original jurisdiction over all the property in the State, both real and personal.

It is conceded, however, that in arriving at the intention of the Legislature, the act must be construed as a whole. As has often been said, in arriving at the legislative intent, courts will look to the statute as a whole, and to all its parts, and when the intention is so ascertained, it will prevail over the literal import and strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted, to other statutes, if there are any, on the same subject, whether passed before or after the statute under immediate consideration, whether in force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished. *Parvin* v. *Wimberg*, 130 Ind. 561.

This act confers original, exclusive jurisdiction upon the State Board of Tax Commissioners over railroad property, but it does not, in express terms, confer such jurisdiction over property generally.

If, therefore, it possessed jurisdiction over the property of the appellees in this case, it is by reason of the

fact that such jurisdiction is conferred by the sections of the statute above referred to.

In the case of *Cummings, Treas.*, v. *Stark*, 138 Ind. 94, the question now under discussion was involved, and the conclusion was then reached that the State Board of Tax Commissioners had no original jurisdiction over the class of property here involved. After a careful reconsideration of the question, we are of the opinion that the conclusion in that case is the correct one. When we reflect that any other conclusion would place it in the power of this board to call from the remotest part of the State, at the instance of an enemy, or on its motion, any citizen, on the most trivial matter or without any just cause whatever, to the capital of the State, at large expense, to defend against an effort to place an unjust value upon his property and burden him with an unjust tax, we can not believe that it was the intention of the framers of this statute to give it the power contended for by the appellant.

The provision conferring upon this board the powers possessed by the county boards of review was intended, we think, to confer such powers in cases where it had jurisdiction, either original or appellate, and was not intended to confer original jurisdiction over all property in the State. The limited time within which the State Board of Tax Commissioners is required to transact the business confided to it would seem to preclude the idea that it was the intention to confer on it jurisdiction so extensive as that contended for by the appellant, for we must know, as matter of common knowledge, that it would be impossible, in that short time, to review any considerable number of the numerous tax lists made out in a populous State like this.

The imperfect manner in which the work would, of necessity be done, for want of time, we think, be more

likely to result in injustice than to secure an equal and just valuation.

For these, as well as for many other reasons which might be given, we are of the opinion that it was not the intention of the General Assembly to confer on the State Board of Tax Commissioners original jurisdiction over the class of property to which this suit relates.

We can not agree with the appellant in his second contention. The complaint alleges that the State Board of Tax Commissioners increased the valuation of the property of the banks therein named. If the tax is assessed against the banks, the fact that the stock may be owned by private individuals furnishes no reason why the suit may not be maintained by the banks to enjoin an illegal tax assessed against them.

Indeed, if the tax is assessed against the banks they are the only proper parties by whom a suit for that purpose could be prosecuted.

As to the third objection made to this complaint, it may be said that the rule has long been established in this State, that where two or more plaintiffs unite in bringing a joint action, and the facts stated in the complaint do not show a joint cause of action in them, a demurrer will lie upon the ground that such complaint does not state sufficient facts to constitute a cause of action. *Berkshire* v. *Shultz*, 25 Ind. 523; *Goodnight* v. *Goar*, 30 Ind. 418; *Lipperd* v. *Edwards*, 39 Ind. 165; *Maple* v. *Beach*, 43 Ind. 51; *Parker* v. *Small*, 58 Ind. 349; *Harris* v. *Harris*, 61 Ind. 117; *Stephenson, Exr.*, v. *Martin*, 84 Ind. 160; *Martin* v. *Davis*, 82 Ind. 38; *Darkies* v. *Bellows*, 94 Ind. 64.

It is contended by the appellees, however, that the case of *Heagy* v. *Black*, 90 Ind. 534, establishes an exception to this rule, but we are not of that opinion. It is true, where an illegal tax has been levied, which af-

fects alike the property of a community, or where a public improvement has been illegally ordered, the assessments for which affect the property of a number of individuals, those affected may unite in an action for the purpose of avoiding such illegal tax or assessment, because they all have a common interest. It is upon this principle that the case of *Heagy* v. *Black, supra*, rests.

Though the plaintiffs in that case owned separate pieces of property, they had a common interest in preventing the supervisor from opening the road then in controversy, because, when opened, it would affect the property of both.

But no such community of interest is shown in this case. There is absolutely no connection between the two appellees in this case. They were assessed separately. The tax assessed against one does not affect the property of the other. The relief to which one is entitled, if granted to it alone, does not affect the other. In the absence of some common interest they could not unite in a suit.

We are of the opinion that the circuit court erred in overruling the demurrer of the appellant to the complaint in this cause, for the reason that it does not show a joint cause of action in the appellees.

Judgment reversed, with directions to the circuit court to sustain the demurrer of the appellant to the complaint in this cause.

Filed May 9, 1894.

No. 16,957.

138 94
137 694
138 91
139 275
138 94
141 137

CUMMINGS, TREASURER, ET AL. *v.* STARK ET AL.

TAXES.—*State Board of Tax Commissioners.—Original Jurisdiction.—Extent of Authority to Order Addition.*—The State Board of Tax Commissioners has no original jurisdiction to revise individual tax lists other than railroad property and the equalization of assessments of real estate; and not having the power themselves, they can not order an addition to be made by the county auditor.

SAME.—*Addition to Assessment by County Auditor.—Notice.*—The county auditor has no power to add to an assessment without giving the property owner written notice of his intention so to do.

CONSTITUTIONAL LAW.—*When Constitutional Question will not be Passed Upon.—Practice.*—A constitutional question will not be passed upon unless necessary to a determination of the merits of the case.

PARTIES.—*Taxes.—Action to Enjoin.—County Commissioners.*—In an action to enjoin the collection of taxes, the county commissioners are proper parties along with the county treasurer.

From the Parke Circuit Court.

A. G. Smith, Attorney-General, *D. H. Maxwell* and *H. Maxwell*, for appellants.

E. Hunt and *A. M. Hadley*, for appellees.

McCABE, J.—Appellees brought suit against appellants to enjoin the collection of certain taxes.

The court overruled a separate demurrer of each of the appellants to the complaint, for want of sufficient facts, and appellants refusing to plead further, and electing to stand on their demurrer, judgment was rendered upon said demurrer enjoining the tax.

The errors assigned, separately and jointly, are that the court erred in overruling each of said demurrers.

The complaint, after the title, is as follows:

"That plaintiffs are a firm, and have an office, as such, doing a banking business, with a view to profit, at Rockville, in Adams township, in Parke county, State of Indiana, in the name and style of the 'Parke Bank,'

and that they were so engaged at said place and in said name on the 1st day of April, 1891, and that they were then, and still are, residents of said county and township; that defendant Norval W. Cummings is the duly qualified and acting treasurer of said county; that on said 1st day of April, 1891, plaintiffs, as such firm, and in said firm name of 'Parke Bank,' were the owners of property of the kind and value, namely:

"United States Treasury notes.....	$11,446 00
"United States bond.....	600 00
"Other moneys.....	2,242 00
"Deposits in other banks.....	56,651 00
"Notes and bills receivable.....	51,842 00
"Stock in Rockville B., L. F. and S. A.....	1,134 65
"Stock in Edgar Co. Nat'l Bank...	4,000 00
"Stock in Rockville Opera House Co.....	750 00
"Office furniture and fixtures.....	1,000 00
"Real estate in Parke county.....	6,090 00

"And that such firm, in said name, owned no other property; that on said 1st day of April, 1891, they, as such firm, were indebted to their depositors, for deposits in their said bank, in the sum of $119,465; that on the 1st day of April, 1891, they, as such firm, made out and furnished to the assessor of said township a verified list and statement of all of the above personal property liable for taxation in said county, and also a statement of said indebtedness; that in said statement and list of property returned for taxation, they returned their said deposits in other banks, the said sum of.... $56,651.00
As credits with their other credits..... 51,842.00

The total amounting to $108,493.00

And offset the same by their said indebtness of $119,-465 to their depositors, leaving nothing in the way of credits for taxation; that such list and statement was accepted by said assessor without making any change therein, and was returned by him to the auditor of said county, when the same was passed on by the county assessor and the county board of review of said county without adding to or taking anything therefrom, and finally approved by them as listed by plaintiffs, and no change was ever made therein other than as hereinafter stated; that afterwards the State Board of Tax Commissioners, upon notice to plaintiffs, and over their objections, added $55,651 of said deposits in other banks, to wit, of the $56,651 which plaintiffs had returned as credits, to their assessment, and thereupon notified the auditor of said county to add said sum to their list, and place the same, to wit, said $55,651, upon the tax duplicate against plaintiffs' firm in their said name, which he did without other notice, in their absence, and without their knowledge or consent, and extended the same on the tax duplicate of said county for said year of 1891, and thereupon assessed and carried forward against plaintiffs and their property on said duplicate the sum of $1,046.24 as taxes on said sum of $55,651, and afterwards made out and transmitted to the treasurer of said county a duplicate of said assessments, with said taxes assessed, and that such duplicate is now in the hands of said treasurer for the purpose of collecting the taxes assessed thereon for said county; that plaintiffs have paid to said treasurer all the taxes due upon all the property owned by them, of every description whatever, except the taxes added upon the $55,651 of said deposits of $56,651 aforesaid, and that said treasurer is threatening to and will collect said taxes by distress and sale of plaintiffs' property unless he is enjoined from so doing, and plaintiffs further aver that

said taxes are a cloud upon the title to their property, and should be removed, and said treasurer perpetually enjoined from collecting or attempting to collect the same, for the reasons, namely:

"*First.* The said assessment made pursuant to the order of said board of tax commissioners was without authority of law.

"*Second.* The said assessment against plaintiffs, by said auditor, was without any lawful notice or authority of law.

"*Third.* That on the 1st day of April, 1891, said deposits of $56,651 were not moneys belonging to them, but were credits to their bank, on the books of other banks where such deposits had been made in their usual course of business as bankers, and for banking purposes; and that no part thereof was on special deposits, and that all of their said deposits with said banks, amounting to $56,651, and all their other credits of $51,842, did not equal their indebtedness of $119,465 aforesaid. Wherefore plaintiffs pray judgment that the adding of said sum of $55,651 to plaintiffs' taxables, and assessing $1,046.24 taxes thereon, was without authority of law; that the said deposits were credits from which debts should be deducted, and that the said $55,651 was not liable to taxation, and that the defendants and their successors in office be forever and perpetually enjoined from collecting or attempting to collect said taxes assessed on said $55,651, and for all other and proper orders, judgments, and decrees in the matter."

The first question presented is whether the order of the State Board of Tax Commissioners complained of was valid. The powers of such board being purely statutory, that question must depend upon a proper interpretation of the tax law approved March 6, 1891.

Acts 1891, p. 199. It is conceded on both sides that section 114 of that act confers jurisdiction and plenary power on the "county board of review," not only to hear complaints of any owner of personal property, except "railroad track and rolling stock," and to equalize the valuation of property and taxables made subsequent to the first day of April, and to correct any list of valuation, but also to equalize the valuation made by the assessor, either by adding to or deducting therefrom such sums as are necessary to fix the true cash value. But it is contended by the appellant that original jurisdiction to do these same acts is conferred also on the State Board of Tax Commissioners by sections 120 and 129, and other sections of that act. By sections 120 and 125, the power to do these things on appeal is conferred on the State Board of Tax Commissioners. In support of this contention appellant cites *Cleveland, etc., R. W. Co.* v. *Backus*, 133 Ind. 513. This court in that case said: "As to property other than that denominated by the law as 'railroad track' and 'rolling stock,' including all property, real and personal, of individuals, the law provides for its assessment by assessors, and it creates county boards of review in the several counties of the State, and by section 114, from which we have hereinbefore quoted, it is provided that such county boards 'shall pass upon each valuation, and may, on sufficient cause being shown, or on its own motion, correct the assessment or valuation of any property in such manner as will, in its judgment, make the valuation thereof just and equal.' While this section may not give to county boards the right to change individual assessments of parties not legally before the board, it evidently contemplates and gives the right to parties whose property has been wrongfully or erroneously assessed to voluntarily appear before such county

board and show that the assessment made against any property is erroneous, and have it corrected, and it vests in such county boards the power, on such showing being made, or on their own motion, to make corrections and change the valuation; and from a decision made against a party who is before such county board, it gives an appeal to the State Board of Tax Commissioners, whose decision upon the question shall be final.

"By section 129 of the statute from which we have heretofore quoted, this same right to be heard given to all property owners, and the power vested in the county boards of review, to correct and change assessments, by section 114, is ingrafted into and made a part of the law governing the proceedings before the State Board as to valuations and assessments over which such State Board has jurisdiction and control, for by section 129, *supra*, it is declared that the State Board is hereby given all the powers given to county boards of review. The right of parties to be heard, and the right of the county boards to hear showings as to assessments, and to correct and change assessments and valuations are a part of the powers vested in the county boards, and all their powers are transferred and invested in the State Boards, so that, if there is any power in the county boards to hear grieyances and make corrections in relation to property and assessment over which they have jurisdiction, then the State Board has the same power in relation to property and assessment over which it has jurisdiction."

This language clearly recognizes the appellees' contention that the powers of the State Board as to assessments and corrections of tax lists is by appeal, and not original, as appellant contends; indeed no part of the decision lends any support to appellants' contention. Appellant contends that section 120 (subdivision 2) providing that the State Board shall have power "to construe the

tax and revenue laws of the State"; (subdivision 3) "to see that all assessments of property in this State are made according to law"; and (subdivision 5) "to see that all taxes due the State are collected," confers original jurisdiction on the State Board, if it cares to exercise it, along with other taxing officers, of all property, and differing from the other taxing officers only in that its decision is final."

Had such a contention been a tenable one, it would have afforded a happy and much easier solution of the grave constitutional questions than the one reached, and saved this court much labor and trouble. If that construction of the provision quoted were correct, then there was no constitutional question involved in that case, because, in that event, all property and all property owners would alike be subject to the original power and jurisdiction of the State Board to make assessments and valuations of all kinds of property of all kinds of owners, and corrections thereof, by adding thereto or deducting therefrom so as to equalize, etc., and the complaint of the appellant in that case would have been without any foundation as to a denial of the equal protection of the law.

There is another reason why such a construction is inadmissible, and that is section 142, authorizing the county auditor to add omitted property, with the valuation thereof, and the amount of tax thereon, to the duplicate, requires him, in case the owner lives in the county, to give him written notice of his intention to add such property requiring such person to appear before him at his office at a specified time within five days after giving such notice to show cause, if any, why such property should not be added, etc. There is no provision we have been able to find, authorizing the State Board to issue or serve a notice on a property owner of their intention to

add property to his list and charge him with its tax or in any other way to increase the amount of his taxes. The general scope and spirit of the act contemplates that notice would be essential before such an act could be validly done, where, as here, the owner lived in the county; indeed, it expressly provides for notice as a condition precedent to the exercise of such a power by the county auditor, the only officer outside of the county board it expressly authorizes to do such an act. The Legislature was careful not to leave even so small an exercise of power by the State Board as the issue of a subpœna for witnesses to inference, but expressly provided for it in section 123. Therefore, it seems a reasonable inference that if the State Board was to be authorized to issue such a notice it would have been so provided. It is not even contended by appellant that it was intended by the Legislature that the State Board should exercise this power, without notice, and the State Board even gave the notice. But the giving of a notice unauthorized by law is not a legal notice. *Kuntz* v. *Sumption, Treas.*, 117 Ind. 1.

Another reason why that power was not intended to be exercised by the State board is its impracticability, and the great hardship and injustice to property owners to be required to attend at the State capital to have a cow properly appraised and valued for taxation that could be as well, if not better, done at their county seat. The construction contended for is at war with the principles of construction laid down in the case referred to. It is there said by this court: Courts will presume that the Legislature intended its acts to be reasonable, constitutional and just; and, when possible, consistently with any fair rendering of the words, will so construe them as not to make them otherwise. "If the Legislature manifests an intention to create a system for the govern-

ment of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts, and uniform in its operation."

We, therefore, conclude that the State Board had no original jurisdiction to revise individual tax lists other than "railroad property" and the equalization of assessments of real estate. Hence, they had no power to order any part of the $56,651 to be added to the appellees' assessment, and they had no power to legally notify appellees of their intention so to do, or notify the auditor of Parke county to make such addition, and said auditor had no power to make such addition without giving appellees notice in writing of his intention so to do, and hence his act in making such addition was without authority of law, and void.

We are asked to go on and determine whether section 59 of the act is not unconstitutional, which requires unincorporated banking associations to return their deposits in other banks subject to draft, not as credits, but as money from which their indebtedness to their depositors can not be deducted, while other tax payers, as is contended, are authorized by the act to return their deposits as credits, and to deduct therefrom their indebtedness. While the courts ought not to shun the consideration of the question of the constitutionality of a statute they ought not to go out of their way to find or decide such questions unnecessarily. They ought not to seek to draw such momentous questions into their adjudication collaterally, nor on trivial occasions. It is both more proper and respectful to a co-ordinate department of the State government, to discuss and pass upon the constitutionality of a statute only where that is the thing involved in the litigation, and where it is necessary to the determination. Thus presented and de-

termined, the decision carries a weight with it which can not belong to an extra judicial determination. *Hoover* v. *Wood*, 9 Ind. 286; 3 Am. and Eng. Ency. Law, 676, and authorities there cited. From our conclusions before reaching the constitutional question, it is apparent that the judgment below awarding all the relief asked must be affirmed. It is therefore wholly unnecessary to the relief asked by either party in this court to pass on the constitutional question. While the board of commissioners was not a necessary party, yet, as they represented the county whose interest alone was involved more than the treasurer did, they were proper parties. The court below committed no error in overruling either of the demurrers.

The judgment is affirmed.

Filed June 6, 1893; petition for rehearing overruled May 11, 1894.

No. 16,650.

Tewksbury *v.* Howard et al.

138 103
142 473

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145 269
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150 483
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Description.—*Real Estate.—Omission of State.—Parol Evidence.—Judicial Notice.*—Where the description of land is complete in every respect, except the county and State wherein the land is situated is omitted, the description being by section, township and range, the court takes judicial notice that there could be but one such description in this State, the fact that the land is located in this State may, under proper averments in the complaint to that effect, be proven by parol.

Contract.—*Agent.—Parol Authority to Sign.—Parol Evidence.—Specific Performance.*—Where a contract for the sale and conveyance of land is made, and signed by one person (A) as owner, and the complaint for specific performance discloses the fact that the land was held in common by A and several others, and alleges that A signed the contract for himself and for such other owners as their authorized agent, the authority of A to sign the contract may be proven by parol.

Tewksbury *v.* Howard *et al.*

PRACTICE.—*Judgment Based on One Paragraph of Complaint.—Rulings on Other Paragraphs Not Available Error.*—Error can not be predicated upon a paragraph of complaint, where the special findings show that the judgment is based upon another paragraph of the complaint.

ESTOPPEL.—*Contract.—Real Estate.—Conveyance.—Waiver.*—Where a grantee of real estate procures the conveyance to be made in a manner different from that stated in the contract for conveyance, he can not thereafter object that the contract in that respect was not complied with.

HARMLESS ERROR.—*Sustaining Demurrers to Paragraphs of Answer.—Same Facts Probable Under General Denial.*—Sustaining demurrers to paragraphs of answer is not available error, if error at all, where the same facts are provable under the general denial, which is pleaded.

TITLE.—*By Adverse Possession.—A Marketable One.—Quieting Title.*—Title by adverse possession is as high as any known to the law, and is a marketable title, and a decree quieting the title is only a confirmation of the title so held.

SPECIAL FINDING.—*Motion to Strike Out or to Make More Specific.—Practice.—New Trial.*—A motion addressed to a special finding, either to make more specific or to strike out, etc., is not authorized by any rule of practice, the remedy for any such defects being by motion for new trial.

JUDGMENT.—*Form Not Objected to in Trial Court.—Supreme Court Practice.*—Where no motion to modify a decree was made in the trial court, the form of the decree can not be objected to on appeal.

PARTIES.—*Defendant.—Specific Performance.—Contract.—Conveyance.*—Where A entered into a contract with B to convey to him certain lands, and upon request of B, A made the deeds to both B and his wife, and tendered the same to B, which were refused, the wife was not a necessary party defendant in a suit for specific performance.

From the Wells Circuit Court.

A. L. Sharpe, C. E. Sturgis, E. R. Wilson and *J. J. Todd*, for appellant.

L. Mock, L. B. Simmons, J. Morris, Sr., R. C. Bell, J. M. Barrett and *S. L. Morris*, for appellees.

HACKNEY, J.—This was a suit by the appellees to enforce specific performance of a contract in writing, as follows: "Article of agreement made and entered into

on the 2d day of June, 1890, by and between L. L. Howard, of the first part, and Hiram Tewksbury, of the second part, witnesseth that said first party has this day sold to the said second party the following described real estate: The east half of the southeast quarter, and the east half of the northeast quarter of section thirty-six (36), township twenty-five (25), range eleven (11) east, for the sum of eight thousand dollars ($8,000); one-third to be paid cash down, one-third in six months, and one-third in eighteen months. The party of the first part agrees to make the party of the second part a good warrantee deed as soon as due diligence will permit. The party of the second part agrees to give his obligations for deferred payments with interest at the rate of six per cent. per annum, and one-third in cash on receipt of the deed.

Witness our hands and seals this day and year above written.

L. L. HOWARD.

"HIRAM TEWKSBURY."

The amended complaint, upon which there was issue and trial, was in three paragraphs. Demurrers were overruled, issues formed, trial and finding against the appellant. The first question upon the sufficiency of the several paragraphs of complaint arises upon the statute of frauds. As seen from the contract, the county and State of the location of the land are not named, and it is insisted that this omission is fatal, and may not be cured by allegations of ownership, possession, situation of the parties, and dealings with reference to a tract of that description within the county of Wells, and State of Indiana.

The rule often recognized in this State is, that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should

be introduced, parol evidence may be received to complete the description and identify the property. *Colerick* v. *Hooper*, 3 Ind. 316; *Maggart* v. *Chester*, 4 Ind. 124; *Torr* v. *Torr*, 20 Ind. 118; *Guy* v. *Barnes*, 29 Ind. 103; *Baldwin* v. *Kerlin*, 46 Ind. 426; *Calton* v. *Lewis*, 119 Ind. 181; *White* v. *Stanton*, 111 Ind. 540; *Weaver* v. *Shipley*, 127 Ind. 526.

It is so held elsewhere, and is applied where the State, county, city or town has been omitted. *Briggs* v. *Munchon*, 56 Mo. 570; *Hurley* v. *Brown*, 98 Mass. 545; *Mead* v. *Parker*, 115 Mass. 413; *Atwater* v. *Schenck*, 9 Wis. 151. See, also, Reed Statute of Frauds, 414, (416); Browne Statute of Frauds, 393, and Waterman Specific Performance, 322.

Extraneous facts are alleged in each paragraph sufficient to identify the land described in the contract.

We do not place our conclusion upon the rule adhered to in *Noland* v. *State, ex rel.*, 115 Ind. 529; *Bryan* v. *Scholl*, 109 Ind. 367; *Stockwell* v. *State, ex rel.*, 101 Ind. 1; *Smith* v. *Clifford*, 99 Ind. 113, holding that location may be inferred from the residence of the parties, the place of acknowledgment and the like, appearing upon the face of the instrument. Here the description is full and specific, omitting only the State and county, and when we apply our knowledge that there is but one such tract—as to section, township and range—in the State of Indiana, we have but to identify the tract described as within the State of Indiana. This, under the rule we have stated, may be done.

The cases urged as supporting the appellant's contention upon this point, are *Miller* v. *Campbell*, 52 Ind. 125, where the only description was, "One hundred and twenty acres of land in Shannon county, Missouri"; *Baldwin* v. *Kerlin*, *supra*, where no description was given, and where an erroneous location was stated and was

sought to be modified; *Pulse* v. *Miller*, 81 Ind. 190, where no description whatever was given.

That these cases do not apply here is apparent from a mere statement of their character, and illustrate the rule that a description can not be supplied by parol.

It will be observed that the contract is signed by L. L. Howard, and not by Jane, Samuel, Harvey, Robert G., Thomas B. and William Howard, who are appellees, and were, with the appellee Lewis L. Howard, plaintiffs in the circuit court. This fact is said to vitiate the contract under the allegations of the several paragraphs of the complaint, that at the time of the making of said contract all of the appellees owned said lands. But it was further alleged that the contract was executed by said Lewis L. Howard as the authorized agent for and on behalf of his coappellees, and in denial of the force of this allegation appellant asserts that the contract was required to be in the name of the principals, and to disclose the relation of the agent to the contract, and that the true relation could not be shown by parol. This contention has been held to be unavailing in a case involving this exact question. *Roehl, Admr.*, v. *Haumesser*, 114 Ind. 311. See, also, in addition to the authorities cited in the case last referred to, the case of *Briggs* v. *Munchon, supra.*

It may be regarded as doubtful if the appellant should be permitted to deny the authority of the agent or the existence of the agency, since it was made to appear further that the appellees executed sufficient deeds of warranty to the appellant, and not only tendered them, but took them into court with their complaint.

Objection is made to the second paragraph of complaint because of the allegation therein that Robert G. Howard, appellees' ancestor, had owned the lands and had died testate, devising the lands to the appellees; and

that he left other heirs than the appellees, while there is no allegation of the probate of the will of said Robert G. Howard. There are other sufficient answers to this objection, but we deem it ample to say that the pleading shows the execution of deeds to the appellant by all of the heirs and devisees of the said Robert G. Howard, thereby granting a title complete without regard to the will. However, it appears from the record and special finding of facts, that the judgment of the court was upon the facts pleaded in the amended third paragraph of complaint, and in that paragraph the probate of the will and the full payment of all of the debts of the estate are averred. This being true, if the third paragraph was sufficient, no error could be predicated upon the ruling upon demurrer to the second paragraph of complaint. *Pennsylvania Co.* v. *Marion*, 104 Ind. 239; *Cincinnati, etc., R. W. Co.* v. *Gaines*, 104 Ind. 526; *Lime City, etc., Ass'n* v. *Black*, 136 Ind. 544.

An objection to the third paragraph of complaint, in addition to those already considered, is that it does not allege that there was no administration of the estate of said Robert G. Howard. The presence of such an allegation could lend no strength to the title of the appellees, and its absence betrayed no weakness in that title.

The rule of the case of *Finnigan* v. *Finnigan*, 125 Ind. 262, where an heir sought to recover a debt due to his ancestor's estate, has no application here. There the absence of administration was held necessary to support the heir's title to the claim as against the senior title of an administrator on behalf of creditors. When the debts of an estate are paid, no claim of creditors exists for enforcement against the land.

Another objection to this paragraph of the complaint and the other two paragraphs is that it is alleged that at the request of the appellant several deeds were executed

by the heirs and devisees of said Robert G. Howard to the appellant and his wife, instead of a joint deed or a deed from Lewis L. Howard alone, after procuring conveyances to himself, and instead of a deed or deeds to the appellant alone. It is true that, by the terms of the contract, a conveyance was to be made by L. L. Howard to Hiram Tewksbury, but the objection that the conveyance was not so made does not affect the validity of the contract, nor does the request of the appellant and the compliance therewith constitute a parol modification of the contract, as insisted. These acts of the appellees were but an effort to comply with the terms of the contract, and were performed in this manner at the instance of the appellant, and he can no more complain of the waiver of his rights under the contract and an effort, at his request, to convey the lands as he desired, than he could deny the payment of the purchase money under the contract if he had procured the conveyance to be made to another. Browne Statute of Frauds, sections 424, 425, 426.

The appellant further complains of the action of the trial court in sustaining appellees' demurrer to his third and fourth affirmative answers to the complaint. These answers alleged, as said by appellants' counsel in their brief, "that appellees had not a marketable title to the land at the time the deeds were tendered appellant, averring, in the fourth paragraph, the additional facts as to death and testacy of Robert G. Howard, and in both paragraphs alleging tender of cash payments and offer to execute notes."

These answers were but special negations of the facts alleged in the complaint and necessary to the appellees' cause of action, and were admissible under the general denial, which was also pleaded by the appellant. *Messick* v. *Midland R. W. Co.*, 128 Ind. 81.

The next contention of the appellant is that the trial court erred in overruling his demurrer to the affirmative reply of the appellees. This reply was addressed to several answers, but the discussion of its sufficiency applies it to the second answer alleging the absence of a link from the chain of title of the appellees, in that no conveyance is shown by the record to have been made by one Howe, who is alleged to have been the owner in the year 1841.

The reply in question pleads not only an adverse possession by appellees' testator for more than forty years, but alleges that after the begining of this suit the title had been quieted as against the alleged interest of Howe, by a proper suit in the lower court for that purpose. The principal argument is that the decree quieting title came too late to support this suit, but incidentally it is said that a title by adverse possession is not a marketable title. If a marketable title, it is manifest that the decree so alleged was only in confirmation of the title so held, and the tardiness in procuring it would not defeat the action. Title by adverse possession is as high as any known to the law. *McWhorter* v. *Heltzell*, 124 Ind. 129; *Riggs* v. *Riley*, 113 Ind. 208; *Sims* v. *City of Frankfort*, 79 Ind. 446; *Wilson* v. *Campbell*, 119 Ind. 286; 1 Am. and Eng. Encyc. of Law, p. 301, section 55.

A marketable title can not be said to be more. It was not held, in *Smith* v. *Turner*, 50 Ind. 367, that a title by adverse possession was of less strength than an express record title, but it was held that a marketable title was one not open to reasonable objection. This is the effect of the holdings in nearly, if not quite, all of the authorities. For a full collection of the cases, see 22 Am. and Eng. Encyc. of Law, p. 948, note 2.

A title which is as high as any known to the law should be, and we have no doubt is, open to no reason-

able objection. It has been so held in numerous cases. See *Ballou* v. *Sherwood*, 49 N. W. Rep. 790, and authorities cited; also 22 Am. and Eng. Encyc. of Law., 950, note "Title by Adverse Possession Sufficient."

The appellees insist that it is sufficient to show a good title at any time before final decree, and cite the following cases: *Hobson* v. *Buchanan*, 96 N. C. 444; *Hepburn* v. *Auld*, 5 Cranch, *262; *Seymour* v. *Delancy*, 3 Cow. 445; *Pierce* v. *Nichols*, 1 Paige, 244; *Baldwin* v. *Salter*, 8 Paige, *473; *Fraker* v. *Brazelton*, 12 Lea (Tenn.), 278; *Luckett* v. *Williamson*, 37 Mo. 388; *Stevenson* v. *Polk*, 32 N. W. Rep. 340; *Townshend* v. *Goodfellow*, 41 N. W. Rep. 1056.

In *Stevenson* v. *Polk*, *supra*, the lands were subject to the record lien of a mortgage which was not entered satisfied until after the suit to enforce specific performance was entered, but before the trial. The court held that "it is sufficient if the title is perfected or incumbrances removed prior to the trial. If the court can then, by decree, protect the rights of all parties, this is all either can justly ask." To this conclusion are cited *McKinney* v. *Jones*, 57 Wis. 301; *Montgomery* v. *Gibbs*, 40 Ia. 652; Pom. Cont., section 421.

It is not essential to an affirmance that we should adopt this conclusion, but aside from the question of costs, we see no objection to the doctrine. However, it was held in *Cook* v. *Bean, Admr.*, 17 Ind. 504, and *Mather* v. *Scoles*, 35 Ind. 1, that the power to so protect the rights of the parties was given in cases where diligence had been employed to perfect the title before suit, and where the purchaser had gone into possession, and the defect in title is a secret one only discovered after suit. Upon our holding this apparent conflict in authority need not now be settled.

The appellant made five several motions, addressed to

the special findings of the court to make more specific, to strike out, etc. Such motions are not proper. *Sharp* v. *Malia*, 124 Ind. 407.

Upon the motion for a new trial, the appellant assails many of the very numerous findings of fact, some of them as not sustained by the evidence, others as not within the issues, still others without argument, and still others as to form merely. We have examined the findings with reference to the issues and the evidence, and find them unobjectionable and fully supported. The objection is also discussed, that the court did not find certain facts requested by appellant. As already suggested, the motions addressed to the special findings present no question, and we can not, therefore, compare the findings asked by appellant with those made by the court as urged by appellant's counsel.

Numerous objections are urged to the admissibility of evidence upon the appellant's theory of questions which we have passed upon, and it will not be necessary to repeat them.

It is further contended that it was error in extending a lien upon the land for the amount of the agreed purchase price, there having been no provision for such lien in the stipulations of the contract. No motion was made to modify the decree, and the question suggested is not before us; however, it is probable that the vendor's right to a lien did not depend upon an express stipulation to that effect.

The appellant also suggests that the deeds tendered having been executed to him and his wife, the decree enforcing specific performance upon such tender, the wife not being a party to the suit, was not authorized inasmuch as the consent of the wife to the conveyance was necessary. As before said, there was no motion to modify the decree, and its orders are not to be ques-

tioned unless they are unsupported by the evidence, or they are based upon conclusions of law not sustained by the special findings of fact. The wife was not a necessary party, under the contract, to the deeds nor to this suit, and, as we have held, the execution of deeds to her, in connection with the appellant, was by the procurement of the appellant, and if the wife's consent was essential to the validity of a title in her it was not for the appellees to procure that consent. Even if, as appellant says, her consent was essential, and the deeds have failed to convey title to her, they are sufficient as to the appellant, and that far comply strictly with the contract.

Upon a motion for a *venire de novo* the appellant suggests many alleged inconsistencies in the special findings, and the supposed absence of findings essential to the conclusions reached by the court. Some of the objections thus raised stand upon the appellant's theory as to the main features of the case, and this we have decided against the view of his counsel. The findings fully sustain the conclusions and the judgment.

There is no error in the record for which the judgment should be reversed, and it is therefore affirmed.

DAILEY, J., did not participate.

Filed May 8, 1894.

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No. 16,545.

RACER ET AL. *v.* WINGATE ET AL.

DRAINAGE.—*Ditch, When Not Constructed According to Plans and Specifications.—Commissioner's Report.—Rejection.*—Where the plans and specifications and the order of the court require that a ditch be so constructed that the banks may have one foot of slope for every foot of depth, and that the dirt removed from the ditch should be placed at least two feet from each bank, and given a slope of one foot to each foot in depth, the construction of the ditch with perpendicular banks, and the dirt removed being placed at the required distance but not being given the required slope, is not a construction according to the plans and specifications and the order of the court; and under such a state of facts, the report of the drainage commissioner that the ditch had been constructed according to the plans and specifications should be rejected.

SAME.—*Special Finding.—Conclusion of Law.—Construction According to Order of Court.*—The finding of the court "that such open ditch, as constructed, has been completed by the contractor," does not show that the work has been done according to the plans and specifications, or according to the order of the court, and is not, therefore, sufficient to authorize a conclusion of law that the commissioner is entitled to a judgment approving his report.

SAME.—*Judicial Notice.*—The court takes judicial notice of the purpose of plans and specifications for the construction of a ditch, requiring the banks to be given a certain slope.

SAME.—*Commissioner's Report.—Exceptions.—Quære.*—Could the fact that the ditch, as constructed, is as beneficial to those assessed for its payments as it would have been had it conformed to the plans and specifications, be put in issue where exceptions are taken to the commissioner's report that the ditch has been constructed according to law?

SAME.—*Ditch.—Rights of Interested Parties.*—While parties assessed for the construction of a ditch may, if the ditch is not being constructed according to the order of the court, have the contractor and commissioner cited for contempt of court, yet that is not their only remedy. Those interested in the construction of the ditch have the right to assume, up to the time the ditch is completed, that it will be constructed in substantial compliance with the order of the court, and are not compelled to keep watch over its construction.

Dissenting opinion by MCCABE, J., in which HOWARD, C. J., concurs.

From the Blackford Circuit Court.

R. Gregory and *A.C. Silverburg*, for appellants.

B. G. Shinn, E. Pierce and *T. E. Ellison*, for appellees.

COFFEY, J.—On the 4th day of June, 1891, Charles A. Rhine, as drainage commissioner, charged with the construction of a public ditch described in the record in this case, filed a report in the Blackford Circuit Court. So much of the report as is necessary to the controversy here, is as follows: "Comes now Charles A. Rhine, drainage commissioner, charged with the construction of said drain, and shows and reports to the court that Henry C. Paul, to whom the contract for the construction of said ditch was awarded, has fully and completely constructed said ditch according to the contract for the construction thereof heretofore entered into between said Paul and a former drainage commissioner charged with the construction of said ditch, and according to the plans and specifications heretofore adopted and approved by this court."

To this report the appellants, who are assessed to pay for the construction of the ditch, filed exceptions upon which issues were formed. The cause was tried by the court, resulting in a special finding of the facts upon which the court stated conclusions of law, and rendered judgment for the appellees, approving and confirming the report above set forth.

The assignment of error calls in question the correctness of the conclusions stated by the trial court upon the facts found. The sole question involved in the case is the question as to whether there should be an adjudication on the facts found by the trial court to the effect that the ditch described in the finding has been completed according to the plans and specifications. The question of the sum to be paid to the contractor is not

involved except incidentally. He is not a party to this suit. He receives his pay from the commissioner of drainage. As the report of the commissioner in this case contains the statement that the ditch has been completed according to the plans and specifications, it is not doubted that its approval by the court would constitute such an adjudication of that fact as would preclude every one from disputing it, so that the contractor would become entitled to receive the full contract price for the work whether he has, in fact, complied with his contract, or has violated it. In this incidental way, and in no other, is the amount to be paid to the contractor involved.

It is not claimed by either party to this suit, that the ditch in controversy has been completed according to the plans and specifications adopted by the court for its construction. It has been solemnly declared by this court time and again that those who pay the assessments have the right to insist upon the construction of the work as it has been established by the report of the commissioners, and by the judgment of the court. It has, furthermore, been held that it is not to be presumed that the court would approve the final report of the commissioner and strike the cause from the docket until satisfied that the work had been completed according to its order. *Indianapolis, etc., Gravel Road Co.* v. *State, ex rel.*, 105 Ind. 37; *Fries* v. *Brier*, 111 Ind. 65; *Smith* v. *State, ex rel.*, 117 Ind. 167.

The finding of the court "that such open ditch, as constructed, has been completed by the contractor," does not show that the work has been done according to the plans and specifications, or according to the order of the court, and is not, therefore, sufficient to authorize a conclusion of law that the commissioner is entitled to a judgment approving his report.

The court carefully omits to find that the work has been done according to its judgment or order, or according to the plans and specifications. Indeed it could not make such a finding in view of the preceding facts found. The facts found make it plain that there was almost a total disregard of the order directing the work. The plans and specifications, as well as the order of the court, required the ditch to be constructed with banks sloping one foot to each foot in depth. They also required that the dirt removed from the ditch should be placed at least two feet from each bank, and given a slope of one foot to each foot in depth. The finding shows that neither of these requirements has been complied with by the contractor. The banks were cut perpendicular, and while the dirt removed from the ditch was placed the required distance from the banks it was not given the required slope. The purpose of these requirements is easily and well understood, and involves matters of which we take judicial notice. It is well settled that the courts take notice of matters of common notoriety, as well as of the ordinary laws of nature. Am. and Eng. Ency. of Law, vol. 12, p. 195.

It is a well known fact that a current of water striking a perpendicular bank will ordinarily create a concave, thus causing the bank to fall. In the case of a ditch, we must take notice, we think, that the falling in of the banks would tend to fill it and obstruct the flow of the water, and thus lessen its usefulness. The purpose, therefore, of requiring the banks of this ditch to be given a slope of one foot to each foot in depth was to prevent the cutting and falling in of the banks, which would otherwise occur.

The purpose of requiring the dirt removed to be placed at least two feet from the banks of the ditch, and given the slope named in the plans and specifications, was to

prevent it from falling back into the ditch from which it was removed. With the perpendicular banks constantly cutting and falling, by the action of the water, we have no assurance that the dirt deposited on the banks will not soon be reached, and that it will not fall into and obstruct the ditch. The plans and specifications were designed to prevent these results, and the order of the court required that they should be observed. There is no pretense that they have been complied with, and yet we are asked to solemnly adjudge that the work has been performed according to the plans and specifications. If we adjudge that the commissioner of drainage is, under these facts, entitled to have his report approved, which sets forth that the work has been completed according to the plans and specifications adopted by the court, we adjudge that a thing is true which appears upon the face of our judgment to be untrue. We can not consistently say by our judgment that this ditch has been completed according to the plans and specifications when the contrary appears on the face of our record.

We do not think the appellants can complain simply because the ditch may be constructed with greater capacity than that contemplated by the plans and specifications, but they have just cause to complain, we think, if the banks of the ditch and the dirt excavated are not given the required slope, if thereby the value of the ditch to those who are required to pay for it is lessened.

It is said, however, that it appears from the special finding of facts that the ditch constructed by the contractor is larger than the ditch called for by the plans and specifications, and as beneficial to those who are to be assessed to pay for it, as it would have been had the order of the court been followed, and therefore they can not be heard to complain.

In answer to this position we would say (1) that there

is no finding of the court that the ditch, as constructed, is as beneficial to those assessed for its payment as it would have been had it conformed to the plans and specifications. Such a conclusion is a mere inference from the fact that it is wider than the one called for. We do not think such an inference follows, for the reasons above stated. (2) There was no issue involving such a question in the trial court. The simple issue for trial related to the question as to whether the work was done according to the plans and specifications under which the work was ordered, the appellants alleging that it was not so done, setting out many particulars in which there was a departure.

Indeed, we are unable to conceive of how such an issue could be formed in this case. Had this been a suit by the contractor against the drainage commissioner to recover compensation for his work, such an issue, perhaps, might have been tendered and tried, but we do not think such an issue could be tendered where the only question for consideration was as to whether the work had been done according to the order of the court. It is enough, however, to say that no such issue was tendered in this case, and yet we are asked to cut off the possibility of making such an issue between the proper parties by adjudging that the work has been done according to the plans and specifications.

Again, it is said that the remedy of the appellants, if the work was not being done according to the plans and specifications, was to have the drainage commissioner and contractor cited for contempt for disobeying the order made by the court for the construction of the ditch, and as they did not avail themselves of this remedy they should not be heard now.

We are willing to concede this remedy to its fullest extent, but when and how is it to be exercised, and when

does the right to exercise it cease? Is it the law that those who are assessed for the construction of a public ditch must keep constant watch and ward over the commissioner and contractor, and when it is discovered that there is a departure from the order of the court, hasten to the county seat, employ a lawyer, and cite them to show cause why they should not be fined for contempt? We think not. We think that those interested in the ditch have the right to assume, up to the hour work ceases, that it will be finished in substantial compliance with the order of the court, and that they may exercise their right to cite the commissioner and contractor at any time before they are cut off by the approval of the commissioner's final report. But while we concede the remedy above mentioned, we are unwilling to hold that it is the only remedy. To so hold is to say that the appellants in this case have no right to be here. If the special finding in this case disclosed the fact that the ditch in question was constructed only one-half as wide, and that it contained only one-half the depth called for by the order of the court establishing it, would any one doubt the right of the appellants to have it set aside on their exceptions? To hold that citation for contempt is the only remedy, is to hold that those who are interested in the ditch have no right to except to the final report of the commission. We think they have both remedies. Whether they have other remedies, we need not inquire.

If it be said that it is now impossible to complete the construction of the ditch according to the plans and specifications and the order of the court, by reason of the great width at which it has been cut, and that a refusal to approve this report may result in a loss to the contractor, the question naturally arises: Who is at fault? Certainly not the appellants, for the finding of the court

shows that they objected to and protested against the manner in which the work was being done, at every step, and that the commissioner and contractor both had notice of such objections and protests. We do not think it can be successfully maintained that courts are organized to relieve parties from the consequences of the willful violation of their contracts. But we think no such question is before us. We are not permitted to look into the future and anticipate questions that may arise upon our enforcement of the law. When we have determined and applied the law in the case before us, our powers and duties are at an end, and we have no concern whatever as to what may be the consequences.

We have carefully considered the case of *Indianapolis, etc., Gravel Road Co.* v. *State, ex rel., supra*, and *Racer* v. *State, for Use*, 131 Ind. 393, and have been unable to bring our minds to the belief that they control the questions involved in this case.

Each of these cases was an action to recover assessments. It was held, and we think properly, that it was no defense to such an action that the work was not completed according to the plans and specifications and the order of the court, nor was it a defense to say that the commissioner and contractor were not prosecuting the work pursuant to the plans and specifications.

The reason given in these cases for so holding is, that under the statute providing for the construction of drains the commissioner has the right to collect the assessments before the drain is constructed and without regard to the condition of the work. Indeed, it is no uncommon thing to collect the whole assessment before the work is completed in order to be able to pay the contractor when he has complied with the terms of his contract.

How the rule thus settled is to be made applicable to

the question involved in this case, we are unable to perceive. The collection of assessments to meet the expenses of constructing a public ditch is one thing, and determining the question as to whether it has been completed according to the order of the court is quite another and different thing.

In what we have said we have not been unmindful of the importance of the question involved in this case. We do not believe that plans and specifications, and the orders of court based thereon, should receive such strict construction as to deter bidders from undertaking the work at a price approximating its reasonable value. Where there is a substantial compliance with the order of the court the contractor should be paid the contract price.

On the other hand, where there is not a substantial compliance with the plans and specifications, those who are to be assessed to pay for the drain should be protected, for the fault is not to be attributed to them. If it is to be understood that those who undertake to tax themselves for these improvements are to have no protection against the violation of the contract under which their work is done the people will be deterred from undertaking such work.

In our opinion, the judgment in this case should be reversed, with directions to the circuit court to restate its conclusions of law and to enter a judgment rejecting the commissioner's report.

Filed Feb. 13, 1894; petition for a rehearing overruled May 10, 1894.

Dissenting Opinion.

McCabe, J.—I can not agree with the conclusion reached by my brothers in this case. Charles A. Rhine, as commissioner of drainage for Blackford county, was charged with the construction of a certain ditch or drain,

known as the Isaac Wingate *et al.* ditch, established by the order of the circuit court of Blackford county, in March, 1885, under the drainage law of 1881, and the amendatory statute of 1883. Section 4273, R. S. 1881, *et seq.*; Elliott's Supp., sections 1175 to 1183. Said Rhine filed his report in said court, showing the completion of the work of constructing said ditch, and asking to be discharged from further liability on account of said work. The appellants filed exceptions to said report, and upon the issues formed a trial by the court resulted in a special finding of the facts, upon which the court stated its conclusions of law, whereon appellees had judgment. The material parts of the special finding are as follows:

"That at the March term, 1885, of the Blackford Circuit Court, the court ordered and adjudged that said ditch be constructed upon the following route, to wit: (then follows a description of the route by metes and bounds); that by the order and judgment of the court establishing said ditch, the same from station O to station 43, was ordered to be constructed as a tile ditch, and from station 43 to the terminus, the same was to be an open ditch; that the same was to be constructed one foot wide in the bottom from station 43 to station 363, and from station 363 to station 470, two feet wide on the bottom; and from station 470 to station 585, four feet on the bottom; and from station 585 to station 629 (the outlet of said ditch), was to be cut and constructed (whenever any construction was necessary) so that the bottom would be ten feet in width; that the banks of said ditch were ordered to be constructed through the open part thereof, with a slope of one foot on each side to one foot in depth, and to have an uniform slope throughout the entire length of said open ditch; that the trees and stumps in the line of said ditch were to be grubbed out, and the logs, brush and rubbish were to be removed to

a distance of at least ten feet from each side of said ditch; the dirt excavated from said ditch was to be placed at least two feet from each bank of the ditch, and to have a slope of one foot to one foot in depth; that the bottom of said ditch was to be made smooth and level, and to have a uniform fall; that after the order of said court establishing the work, the same was referred for construction to one Jesse H. Dowell who afterwards resigned, and one Smith Casterline was appointed drainage commissioner in his place to superintend the construction of said ditch; that said commissioner Casterline let the contract for the construction of said work to one Henry C. Paul, who gave bond for the completion thereof; that afterwards said commissioner Casterline resigned as such commissioner of drainage, and Charles A. Rhine, Esq., was appointed, by the court, commissioner of drainage, to take charge of and superintend said work; that under the direction, charge, and supervision of said drainage commissioner Rhine, the said Henry C. Paul dug, constructed and built the ditch in controversy; that the ditch was constructed over and along an old ditch known as Big Lick Creek, and at many places said old ditch had washed wider than the specifications; that in the construction of said ditch the banks thereof were not given a slope of one foot to one foot in depth, but the same were dug perpendicular, and from station 43 to station 363 the same was constructed from three to twelve feet wide in the bottom, and from station 363 to station 470 from six to eighteen feet wide in the bottom, and from station 470 to station 585, from 7 to 15 feet wide in the bottom; that the trees and stumps were grubbed out and brush and logs were removed at least ten feet from each bank of the ditch, the dirt excavated therefrom was deposited two feet from each bank thereof, but did not have a slope of one foot to one foot in depth; that in some places

along said ditch the banks thereof are wider in the center than at the top or bottom of said ditch, caused by washing of the same; that the whole of said ditch is dug and constructed a great deal larger than the original plans and specifications called for, but no extra cost was occasioned thereby; that the objectors and exceptors herein at all times, from the commencement of the construction of said ditch to the trial of this cause, have continuously objected, both to the contractor and commissioner of drainage in charge, to the manner and character of the construction of said ditch, and that the contractor and the commissioner have at all times had knowledge of such objections; that said ditch has a uniform fall from upper to lower end thereof; that said exceptors are, each of them severally, owners of land affected by the said ditch, and assessed for the construction thereof; that all of said ditch, except 4,300 feet, is open ditch, the 4,300 feet being tile ditch at the upper end thereof, which tile part was made under the order and direction of the court, and without objection by any one, and which tile part has been fully completed as ordered by the court; that such open ditch, as constructed, has been completed by the contractor.

"JNO. M. SMITH, Special Judge."

And the court states, on the above facts found, as its conclusions of law:

"1st. That the report of the commissioner of drainage should be confirmed by the court."

The assignment of errors questions the correctness of the conclusion of law.

The only reason assigned in appellants' brief why the conclusion of law is incorrect is, that the findings of fact show that the ditch was dug or constructed a great deal deeper and wider than the plans and specifications call for, and that the banks were dug perpendicular instead

of having a slope of one foot to one foot in depth, and that the dirt taken out of the ditch and placed on the banks was not given the same slope, all of which was required by the specifications.

It was said by this court, in *Smith* v. *State, ex rel.*, 117 Ind. 174, that "Those who pay the assessments have the right to insist upon the construction of the work as it has been established by the report of the commissioners, and by the judgment of the court."

But the work here has been more than completed. The deviation from the plans and specifications consists chiefly in doing more and a greater work than was required by the plans and specifications, and that without adding anything to the cost of the work to those whose lands are to be assessed to pay for it; that is, the ditch has been made deeper and wider than the contractor need to have done, but the cost is no greater than if the work had stopped at the line of the plans and specifications.

It is difficult to see how the appellants are injured by such excess of work for their benefit. If such excess was an injury to them in any way, that was a question of fact which it was incumbent on them to make manifest; the burden of showing that fact was upon them. In such a case, a failure to find either way is equivalent to a finding against the party having the burden of proving such fact. *Henderson* v. *Dickey*, 76 Ind. 264; *Graham* v. *State, ex rel.*, 66 Ind. 386; *Johnson* v. *Putnam*, 95 Ind. 57; *Parmater* v. *State, ex rel.*, 102 Ind. 90; *Glantz* v. *City of South Bend*, 106 Ind. 305; *Louisville, etc., R. W. Co.* v. *Hart*, 119 Ind. 273.

The apellants had the burden of that issue, because they alleged the fact in their exceptions affirmatively, and because the presumption is that the judgment of the court below is right until the contrary is made to appear affirmatively in the record by the party assailing it.

Myers v. *Murphy*, 60 Ind. 282; *Hunter* v. *Thomas*, 37 Ind. 145; *Lime City Building, etc., Assn.* v. *Black*, 136 Ind. 544; *Ferguson* v. *Hull*, 136 Ind. 339.

Having failed to show, by the special finding, that the excess of work was an injury to them, and as the finding necessarily shows that all the work was done that was required by the order of the court establishing the ditch, they fail to show any available cause for complaint. The failure to give the ditch and the dirt deposited on the banks thereof the required slope may present a somewhat different question.

We are asked to hold as matter of law, and the prevailing opinion accordingly holds, that such departure was injurious to the ditch, or rendered it less useful and valuable for the purpose designed than if the banks and the dirt deposited thereon had been sloped, as required by the specifications and order of the court. With great respect for the opinion of my brothers I can not agree with them in that conclusion. I concede to the fullest extent that courts ought to, and do, take notice of the usual course of nature and its manifestations that belong to the class of uniform occurrence and common notoriety. I concede, too, that water washing against a perpendicular bank in a ditch will be liable to wear the bank so that it would become concave in shape. To what extent this effect may be produced depends largely on the kind of soil through which the ditch is cut. There is nothing in the special finding showing the kind of soil, whether it was loose, sandy loam, hard pan, or hard clay. Without such information this court could not judicially know much about its tendency to wash and wear. I concede, too, that such washing will have a tendency to cause the bank to crumble and fall into the ditch. But I do not think it follows that the courts can

judicially know that such crumbling and falling would materially obstruct the ditch. Especially is that so in this case. If the special finding of facts showed that the ditch had been cut so deep that the perpendicular banks were fifty feet high then I concede that this court might take judicial notice that the usual course of nature in causing such banks to crumble and fall would very likely obstruct the ditch.

But no such state of facts is shown in the special finding. On the contrary, the special finding fails to show how deep the ditch was required to be dug, or how deep it actually was dug, or how deep it actually was at the time of making the report in question.

The ditch was to have been constructed from station 585 to station 470, four feet wide in the bottom, but it was actually made 7 to 15 feet wide. Now, suppose as a matter of fact, that where it is 15 feet wide the banks are no more than four feet high, that is, the ditch but four feet deep there, which would be as deep as is ordinary in such ditches. Can this court adjudge, as matter of law, that such banks, in the usual course of nature, will crumble and fall so far as to obstruct the whole 15 feet in width, or far enough to make the channel of the ditch narrower than four feet?

To suppose that they would go that far would be to suppose that nature would make a very great and extraordinary land slide. It would be to suppose that each four foot bank would fall and spread over the level surface of the bottom of the ditch a distance of 5½ feet from such bank. Thus making each bank spread 1½ feet wider than it is high and the two four-foot banks fall and cover a space of 11 feet in width on a level. I do not believe that such banks would or could, in the course of nature, fall and cover that much level surface

in the bottom, nor do I believe that this court can take judicial knowledge that it would do so. But, conceding that it can, and yet we have left a ditch four feet wide in the bottom, fully up to the dimensions required by the specifications, with the banks sloped by the operation of the laws of nature in substantial compliance with the specifications and order of the court. It will not do to say that, in the absence of the height of the banks and the depth of the ditch in the special findings, we can not suppose such banks to have any particular height or the ditch any particular depth.

We judicially know that the ditch has some depth and the banks some height. That being so, and their height not being shown by the special finding, it may turn out in fact that they are of the very height I have supposed. Now, if that depth and height were not great enough as compared with the known width, to cause the banks in the course of nature to crumble and fall to such an extent as to make the channel narrower than the specifications called for, then this court can not know, either judicially or otherwise, that the perpendicularity of the banks was injurious to, or impaired the usefulness of, the ditch.

But that is not all. The special finding shows that the work of construction began as far back as June, 1885, four years prior to the time of the report of the completion of the work now in question. If it took four years to complete this vast work, portions of it must have been completed years before the final report; that is, portions of the ditch must have been dug long enough before the report in question to give the laws of nature time enough to have their full force and effect in causing the banks to crumble and fall and obstruct the ditch, if ever they would do so. Yet the special finding states that

"Said ditch has a uniform fall from upper to lower end thereof."

This could not be true if the course of nature could, on account of the perpendicularity of the banks, cause them to fall in to such an extent as to obstruct the ditch. The uniformity of the fall of the ditch is admitted to be true by the appellant's exceptions to the conclusion of law; because an exception to the conclusions of law admits that the facts have been fully and correctly found. *Hartman* v. *Aveline*, 63 Ind. 344; *Robinson* v. *Snyder*, 74 Ind. 110; *Helms* v. *Wagner*, 102 Ind. 385; *Wynn* v. *Troy*, 109 Ind. 250.

As to the dirt deposited on the banks, the special finding shows it to have been "deposited two feet from each bank, * * but did not have the slope of one foot to one foot in depth;" but unlike the finding as to the slope of the banks, where it goes on to state, after stating the lack of such slope, it states that they were perpendicular. No such statement is made as to the want of the proper slope in the dirt. The finding does not state whether it was more than the required slope or less that was given to the dirt deposited on the bank. Either would be consistent with the finding. There is an insuperable barrier to construing it to mean less than the required slope; that is steeper than one foot slope to one foot in depth. There were only two charges made in the exceptions to the report as to the deposit of the dirt. One was that it was "deposited immediately on the brink of the ditch," and the other was that the "other parts thereof scattered promiscuously over the adjacent country in piles and dumps of irregular shapes and sizes, and without regularity or uniformity, * * * and none of it has the same slope as the sides of the ditch, either as made or required to be made by the order * * * and specifications adopted by the court."

The plain meaning of this exception, it seems to me, is that a part of the dirt was placed immediately on the brink of the ditch, and the balance was scattered over the adjacent country without the slope required. That part charging it to have been placed on the brink of the ditch is found untrue by the court. The other part must be held to mean was deposited so far away from the ditch that it can make no difference how it is sloped. Be that as it may, it appears clearly enough that it was not left more perpendicular than one foot slope to one foot in depth, otherwise it would have been so charged and so found; on the contrary, it appears clearly enough that the slope was more than one foot to one foot in depth. The finding, if ambiguous, must be construed, if consistent with its language, to be within the issue, because if it be construed to mean less than one foot slope to one foot in depth, it would have to be disregarded as being outside of the issues. *Pittsburgh, etc., R. W. Co.* v. *Adams*, 105 Ind. 151; *Boardman* v. *Griffin*, 52 Ind. 101; *Thomas* v. *Dale*, 86 Ind. 435; *Brown* v. *Will*, 103 Ind. 71.

If the departure in sloping the dirt consisted in making a greater slope than that required then such departure was not injurious, was immaterial, and furnished no more ground for complaint by appellants than the digging the ditch too wide or too deep.

It is said that there is no finding that the ditch, as constructed, though larger than the specifications call for, is as beneficial or useful as it would have been had it conformed to the specifications and order of the court establishing it. This, I think, is a mistake. While there is no finding to that effect, yet this court is as much bound to take judicial notice of the laws of nature as to the effect thereby produced in the enlargement of the ditch as in the case of perpendicular banks. Therefore we must judicially know that more water will flow

through a large ditch than through a smaller one, and that the larger ditch will carry off the water in ordinary times just as well as the smaller ditch. We must also judicially know that this county is subject to great freshets and heavy rains at times, and that at such times the larger ditch would carry off the water more effectually, and be less liable to injure the banks, and therefore we know judicially that the larger ditch is not only as valuable and useful as the smaller one but is more so.

With all due deference and respect for the opinion of my brothers, I am wholly unable to concur in the holding that there was no such issue. Appellants, in their 9th exception to the report in question, after stating the departures from the specifications, charged the effect thereof as "greatly obstructing the free flow of the water through the said ditch, so that the said ditch is worthless, is not a permanent structure, is not calculated to perform the offices of a ditch in a proper and reliable way;" and in the fourteenth exception that it was "unfit for the purposes for which it was made."

It can hardly lie in the mouth of the appellants to say now that no such issue was involved; indeed, they have not so contended in this court. If no issue could properly be made except the one simple question, viz: Whether the ditch had been completed in strict conformity to the plans and specifications, then such a trial, it is easy to see, would soon degenerate into a controversy over mere bald abstractions and technical niceties as to whether the ditch had been dug an inch or two too deep or an inch or two too wide; it would soon become a controversy over mere shadows to the neglect of substance. Nor can I agree with the prevailing opinion that the confirmation of the report would be an adjudication that would preclude those assessed to pay the expense from raising the question of damage resulting from over-

stepping the boundaries prescribed by the plans and specifications by the commissioner and contractor in the construction of the ditch.

But if I am wrong in this, and the question presented by the commissioner's report and exceptions thereto is whether the work had been completed according to the plans and specifications simply and purely, what then? As already observed, the work has been more than done. There can be no further completion thereof. It was said by this court, in a ditch case, in *Smith* v. *State, ex rel.*, *supra*, at page 172, that: "In practice the cause remains on the court's docket until the final report of the commissioner is made and approved." Now, if the report in the case at bar can not be approved until the specifications have been strictly complied with, then it never can be approved because the ditch has been dug too large, and it is physically impossible to make it smaller. But suppose this court should solemnly adjudge that the report can not be confirmed until the banks are sloped in accordance with the specifications, and remand the cause; and suppose the attempt is made to so slope them, and the owners of the land concerned should resist such attempt on the ground that the boundary of the ditch was already surpassed; such resistance must prove successful. We then would have an adjudication that could not be gotten rid of, and would bind all the parties to the effect that the commissioner's report could never be received, and he could never be discharged by the circuit court.

If the defect in the ditch pointed out in the exceptions was such that it could be remedied, if the work had fallen short of the requirements of the plans and specifications, and had not surpassed them, then, undoubtedly, the land owners might successfully object to the

approval of the report, as well as to avail themselves of other remedies.

However, many of these questions are unimportant here, because whether they are decided the one way or the other ought not to prevent an affirmance of the judgment confirming the commissioner's report, on account of the conduct of the appellants. Because here was a great public work being constructed under judicial sanction for their benefit, twelve or thirteen miles of ditch going on for four years, at a cost of over $15,000, and the only departure from the plans and specifications being that too much work is being done so far as benefits in the way of drainage are concerned, but because of work far in excess of that required by the specifications and order of the court, there is a departure from the specifications and order by the contractor and the drainage commissioner to the extent of constructing a ditch with perpendicular banks instead of being sloped, and dirt excavated from the ditch and placed on the banks is not sloped; the appellants have suffered this to go on without taking any other action than simply to object until the work is finished, and they now come in and object to an approval of the report of the commissioner that the ditch is completed. They do not point out any particular in which the work could be made any more complete under the order and specifications establishing the ditch. Indeed, they show it to be physically impossible now to complete the ditch in exact accord with the specifications and order establishing it, and thereby it would seem they hope to escape *in toto* from paying anything for the benefits they have received. They never applied to the court so far as appears by the record, and asked it to order its officer to keep within the bounds of the order and specifications in the construction of the ditch,

which they might have done successfully, and saved the rights of everybody as well as themselves.

On the contrary, with full knowledge of all that was going on, they suffered the contractor to go on and expend large sums of money for their benefit, and have laid still until all the rights of the contractor must be lost to him if they are now allowed to avail themselves of an objection which, if seasonably made, might have been effective without inflicting loss on anybody for their benefit.

In a suit brought by the State on the relation of this same commissioner of drainage, in the case of *Racer* v. *State, for Use*, in which it was sought to collect assessments on the same ditch, and appealed to this court and decided in 131 Ind. 393, at page 407, it was said by ELLIOTT, J., speaking for the court, that "We regard the answer as bad, although it be construed as sufficiently showing that the work was not done, or being done, as the contract required. In affirming this we do not mean to adjudge that the commissioner has authority to permit a material or injurious departure from the contract. We affirm, on the contrary, that he has no such authority. He may, perhaps, in the exercise of a sound and reasonable discretion, permit departures of an immaterial nature, or which can not result in the injury of the land owners assessed, but he can not authorize a change in the mode of doing the work to the substantial injury of those upon whom the burden of paying for it is cast by law. But it by no means follows that because the duty of the commissioner is to compel the performance of the work in substantial compliance with the contract, his failure to do so will constitute a defense to a suit to enforce an assessment. The land owner is not without remedy, but his remedy is not by way of defense to the assessment. His remedy is to make application to the

court having control of the work, and whose agent the commissioner is, to compel a performance of duty by the contractor and the commissioner. This was expressly decided in the case of *Indianapolis, etc., Gravel Road Co.* v. *State, ex rel., supra.* In that case it was said: 'The remedy is, therefore, to apply to the court, and, through its order and intervention, secure the due execution of the work.' The answer in the case from which we have quoted is very much stronger than the answer in the case before us, for in that case the answer averred that it was impossible to construct the proposed ditch, and stated facts tending to support that averment; and it also averred that the ditch had been abandoned. It is clear, therefore, that we must either directly overrule that case or adjudge the answer before us to be insufficient.''

The answer referred to set up the identical facts found here in the special finding. The answer was held bad. The very same effect would be given to those facts by holding the conclusion of law correct in this case that was given to them in that case, by holding the answer setting them up insufficient.

I am unable to perceive any reason why the case I have quoted from and the case it quotes from, are not authority directly in point in this case. I concede that exceptions to a final report of a drainage commissioner are ordinarily quite a different thing from objections to the collection of assessments to defray the expense of the construction of the ditch. But that difference only exists in its full force where a part of the work remains unperformed. In that case there would be no ground for resisting the payment of assessments, because the statute authorizes their collection in advance of the completion of the work. But where, as shown in those cases, the defense relied on is that the boundaries of the speci-

fications have been exceeded in the construction of a greater, larger, and more valuable work than called for by the specifications, so that strict and literal compliance with such specifications is impossible thereafter, there can be no difference in the effect of such facts, whether they are urged as a defense to assessments or as objections to the confirmation of the report. When urged as a defense to the collection of assessments, it can not be said that such defense fails because the work may thereafter go on to completion as in case where the ditch is only half dug out; but the defense fails for the same reason that objections to the confirmation of the commissioner's final report ought to fail, namely, that the facts show, in the one case, that the land owner is resisting something that does not harm him, and, in the other, that he is filing exceptions to a judicial act that in no way harms him. That being the ground on which those cases rest, they apply with equal force to exceptions to the final report of the commissioner where, as in this case and the one quoted from, the exceptions proceed upon the theory that the work is not expected to be further prosecuted.

The only effect of sustaining these exceptions is not to secure the completion of unfinished work, or work left undone, but, if it has any effect, it is to prevent the collection of assessments. I do not see how it can be successfully maintained that the sustaining of these exceptions is to have no effect whatever. Nor can I agree with the prevailing opinion that the reception and confirmation of the report will constitute an adjudication that will preclude an abatement of the amount to be paid to the contractor. He is not a party to this proceeding, and hence, in a suit against the commissioner for his pay, this adjudication would not bind him, and if it did not bind him, it could not bind the commissioner or any-

body else. *Maple* v. *Beach*, 43 Ind. 51; *Glenn* v. *State, ex rel.*, 46 Ind. 368; *Bartlett* v. *Kochel*, 88 Ind. 425.

I heartily agree with the majority that courts are not organized to relieve parties from the consequences of a violation of their contracts. Nor do I believe, on the other hand, that courts are authorized or organized to enable a party to take from another under the forms of a contract the benefits of his labor without any compensation whatever. The contractor must recover on the contract, if at all. If he can not recover on that for his labor and expenditure for the benefit of the land owners, he can not recover at all. When the parties stand on equal footing each may insist on a literal compliance with the terms of the contract. But that principle is not of universal application. Where a party has received benefits from an imperfect compliance with the terms of a contract, his conduct may be such that every principle of morality and justice alike forbids relieving him from such contract.

Where a ditch was constructed under a contract claimed to be void, without deciding whether the contract was void or not, this court said: "Appellant had full knowledge that the ditch was being constructed by Bozeman under the contract, and that he was expending his money in constructing it, and took no legal steps to stop the work or question the proceedings of the county board until this suit was commenced, several months after the work was accepted by the board as completed, and after the certificate by the auditor * * * had been delivered to Bozeman, and the amount due him from the several land owners had been placed upon the tax duplicate for collection. Having thus stood by, and in silence as to the contract, appellant can not now, in this collateral attack, overthrow the contract and thus escape payment." *Montgomery* v. *Wasem*, 116 Ind. 343 (347).

"Where, in giving notice in a drainage proceeding, there is an attempt to comply with the statute, and some notice is given, though insufficient, parties who have actual knowledge of the petition and proceedings under it, and that money has been expended on the faith that the proceedings are valid, and make no objection, will be presumed to have acquiesced in their validity, and can not afterwards move to dismiss for want of notice." *Peters* v. *Griffee*, 108 Ind. 121.

In *Taber* v. *Ferguson*, 109 Ind. 227, at page 231, this court said: "That an estoppel may be made available in a proceeding to recover a street assessment is well established by the authorities. The rule is thus stated in a late work: 'Thus, a property-holder can not quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract.' This principle has been fully recognized and strongly asserted by this court."

In *Hellenkamp* v. *City of Lafayette*, 30 Ind. 192, at page 194, it was said: "A property holder can not quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract."

In *Muncey* v. *Joest, Treas.*, 74 Ind. 409, at page 413, another ditch case, it was said: "The second cause upon which appellant bases his right to an injunction would be a sufficient one if urged by a person who had not estopped himself by his silence. If the appellant had made the proper resistance to the prosecution of the work, and made it without delay, he would have been entitled to relief. * * As the appellant made no objection until after the work had been fully completed, he is not now in a situation to complain of the insufficiency of the notice of the letting of the contract. Having received the full

benefit of the work done by the contractor, he can not now escape payment upon the ground that proper notice of the letting of the contract was not given. * * * The rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to assert them, which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character. This doctrine has often been adopted and enforced by this court."

To the same effect is *City of Evansville* v. *Pfisterer*, 34 Ind. 36, and many other cases in this court. I see no reason why these principles are not applicable to exceptions and objections to the confirmation of the final report of the drainage commissioner, where such objections do not proceed on the theory of securing a further prosecution of the work, but proceed upon the theory, as here, that the work is not to be received at all by the court.

For these reasons I am of opinion that the judgment ought to be affirmed.

HOWARD, C. J., concurs in the dissenting opinion.

Filed Feb. 13, 1894.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1894, IN THE SEVENTY-EIGHTH YEAR OF THE STATE.

No. 16,795.

NEWPOINT LODGE, NO. 255, FREE AND ACCEPTED MASONS *v.* SCHOOL TOWN OF NEWPOINT.

138 141
143 400
138 141
145 29
138 141
157 335
157 336

DEED.—*Conveyance to School Township for School Purposes.—Implied Condition.—Reversion.— Title.*—Where land is conveyed by warranty deed to a school township, "for the use of the common schools," without any expressed condition, there is no implied condition by which the property would revert to the grantor, upon a mere nonuser of the same for school purposes, the title being as good as could be made to a school township.

SAME.—*School Property.—Township Trustee.—Negligence.—Forfeiture.*—Any negligence or inattention to duty on the part of the school trustee could not work a forfeiture of the property, of which he had but temporary charge.

SAME.—*School Property.—Relocation of School-House.—Abandonment.*—The locating of the school-house on different ground, and the using of the old school-house and grounds for public meetings, the house being supplied for such purpose with temporary seats by the trustee, do not amount to an abandonment of the premises.

SAME.—*Construction by Parties.—When will not Prevail.— Common Schools.*—A construction placed on a deed by the parties, where it is a conveyance to a school township, for the use of the common schools, will not prevail over the plain terms of the deed which is in strict compliance with the statute.

PARTIES.— *School Township.— School Town.— School Property.*— A school town is a proper party in an action affecting property which it acquired by accession, from the school township, by reason of its incorporation.

From the Decatur Circuit Court.

C. Ewing and *J. K. Ewing*, for appellant.

S. A. Bonner, *M. D. Tackett* and *B. F. Bennett*, for appellee.

HOWARD, J.—This was an action by the appellee school town to recover possession of real estate.

The cause was submitted to the court for trial, and there was a finding and judgment for the appellee.

A reversal is asked upon the evidence.

From the evidence, which is not disputed, it appears that on the 23d day of February, 1861, Joel Colson was the owner of the land in controversy, and on that day he and his wife conveyed the same by a deed as follows:

"This indenture witnesseth, that we, Joel Colson and Elizabeth Colson, his wife, of Decatur county, in the State of Indiana, convey and warrant to Salt Creek township, of Decatur county, for the use of the common schools in Decatur county, in the State of Indiana, for the sum of one dollar, the following real estate in Decatur county, in the State of Indiana (describing the land); subject to the right of the Newpoint Lodge, No. 255, of the Masonic fraternity, to erect a lodge upon any building built thereon, and the right of way through the first story to said lodge."

This deed was duly acknowledged and recorded; and the school township of Salt Creek entered into possession of the land and erected a brick building for school purposes, on the top story of which the appellant erected a room for lodge purposes, having a right of ingress and egress, as provided in the deed. The parties so continued to use the premises until the fall of 1880.

In the winter of 1879–80 the school trustee of the township called a meeting of the patrons of the school district, about all of whom attended, at which meeting

it was determined that the building was unsafe and no longer suitable for a school, and that a new school building should be erected. The new building was erected at another location, and the school furniture and appliances were removed to the new building. The old schoolroom was fitted with temporary seats by the school trustee and used for a little over a year longer for general meetings, until the windows and doors became broken, after which it ceased to be used for any purpose.

Joel Colson died intestate in 1881, and, in a partition of his real estate, the land in dispute was set off to his son, Abner Colson. The township was not a party to the partition suit. In the summer of 1882 Abner Colson took peaceable possession of the property, and held it until February 16, 1888, when he conveyed it to appellant, who has held it ever since. Since the summer of 1882, the possession of Abner Colson and his grantee has been exclusive and undisturbed.

One witness testified that, in 1882, he made application to Charles Marlin, then township trustee, to purchase the lot, and that Marlin then told him that he did not know whether he had a right to sell it. Another witness testified that, in 1881, he applied to Marlin to rent the property, and that Marlin told him to go to Abner Colson, as he had the right to rent it. Marlin himself testified that he never had either of such conversations.

It is agreed that the several township trustees, from the time that Abner Colson took possession of said property, lived in the town of Newpoint and had knowledge that he and his grantee were in such possession, and never made any claim to the property or objection to such possession.

Since March, 1890, said Charles Marlin has been one of the school trustees of the town of Newpoint, within

whose corporate limits the property in question is situated. In 1888, just prior to the execution of the deed from Abner Colson to appellant, Charles Marlin was also one of the trustees of the appellant lodge, and, with the other trustees of said lodge, went to the city of Greensburg to examine into the title of Abner Colson to the lot, and, after looking at the deeds in the recorder's office, reported to the appellant that he thought the title was all right; and thereupon, at the request, or under the direction, of the appellant, he paid to Colson the sum of two hundred dollars for a deed to the property.

The said Marlin and another school trustee, acting for said town, in October, 1890, caused the complaint herein to be filed against appellant. It is admitted that said Marlin is not a lawyer, and never claimed to be. This is substantially all the evidence in the case.

The suit was properly brought in the name of the school town of Newpoint, notwithstanding the fact that the land was originally deeded to Salt Creek township.

As said in *School Tp. of Allen* v. *School Town of Macy*, 109 Ind. 559, when a town is incorporated and organized as a school corporation, it succeeds the school township in which it is situated in all educational matters connected with the public schools within its limits, and the title to school buildings previously erected therein by the township vests in the town.

The appellant first contends that since the deed from Joel Colson conveyed the property to the township for "school purposes," therefore when it ceased to be used for such purposes it reverted to the grantor or his heirs. The conveyance was by warranty deed, and the words in the deed show the conveyance to be "for the use of the common schools." These are the words of the statute providing for the title to school property, section 5996,

R. S. 1894 (section 4508, R. S. 1881), which requires that "The title to all lands acquired for school purposes shall be conveyed to the township, incorporated town or city for which it is acquired, in the corporate name of such township, town, or city, which is used for school purposes, for the use of common schools therein."

Yet appellant says that "When this property was abandoned by the township for school purposes, this was a breach of the implied condition in the deed, and the property reverted to the grantor."

We do not think there was any condition, express or implied, in the deed. The deed was in the words required by the statute, "for the use of the common schools;" and it conveyed as good a title as could be made to the school township. The use to which the township might put the land might be, as it was in this case, to erect and maintain a school thereon; or it might be to dispose of the land and select a more eligible site with the proceeds; or, in fine, any other use the corporation might deem best for the benefit of the schools. We do not say that there might not be a condition of forfeiture in the deed, for nonuser, though we do not well see how that could be, following the spirit of the section of the statute above quoted.

Section 6000, R. S. 1894 (section 4511, R. S. 1881), however, seems to recognize the possibility of conditions in title to school property. Be that as it may, there is no such condition in the deed before us. The question has been fully considered by this court in the recent cases of *Sumner* v. *Darnell*, 128 Ind. 38, and *Higbee* v. *Rodeman*, 129 Ind. 244, where it is held that language such as that contained in the deed in the case at bar does not tend to create a condition subsequent, and that the title conveyed is absolute. The former of these cases

refers fully to the authorities, and is decisive of the question.

Appellant's chief contention, however, is, that the parties have, by their acts, placed a construction upon the deed of Joel Colson, according to which construction the property rightfully reverted to his heirs, and was awarded in partition to his son, Abner Colson.

As sustaining this contention, the rule is quoted from *Lyles* v. *Lescher*, 108 Ind. 382, that, "where the acts of the parties have placed a construction upon a contract, the courts will give effect to the contract as the parties have construed it."

This contention, and the rule invoked in its support, proceed upon the assumption that there is some uncertainty in the deed, and that the parties, by their actions, have explained that uncertainty. If the deed were, in fact, uncertain in its meaning, there might be some plausibility in this reasoning, and the rule suggested might be applicable. We have seen, however, that the deed is in plain terms and follows strictly the statutory requirements. If we should admit that deed to be uncertain in its meaning, then, in any case where a school corporation held a deed to a school lot "for the use of the common schools," and should desire to change the location of the school to a more suitable place, doubt would arise at once as to whether the corporation would have good title to the old lot after removing to the new one. And in case the old lot should not be sold for some time, through inability to find a purchaser, or through carelessness or ignorance of his duty on the part of the trustee, the claim might be set up that the school corporation had abandoned title to the lot. We do not think that even private property can be lost in that way.

It may be admitted that if property is abandoned by

the owner, and some one, under color of title, takes possession and holds it adversely for twenty years or over, his possession will ripen into title. But that is not this case. Abner Colson had no color of title, and did not, with his grantee, hold the land adversely for twenty years.

Neither do we think that any abandonment is shown in this case. The trustee, after the building of a new schoolhouse in another place, fitted up the old schoolroom with temporary seats, for such meetings as are often held in schoolrooms, by which the people of the school district and the general public are accommodated. The trustee then seems to have neglected his duty, as other officials sometimes do in the care of public property in their charge. The school corporation was not made a party to the partition suit; so that proceeding does not affect the question.

But, even if all that is urged in the able and earnest brief of counsel for appellant were true as to private parties, and to the construction of deeds conveying property between them, still we do not think it would be applicable to this case. The property did not belong to Charles Marlin, or to any other of the school trustees named; but belonged to the public schools, and was held in trust for them. Any negligence or inattention to duty on the part of the trustee could not work a forfeiture of the public property, of which he had but temporary charge.

It may seem a hardship to appellant to lose its investment in this property; but, because it trusted to the representations of its trustee, it does not follow that the rights of the public schools of the State should suffer.

There is no dispute as to the right of appellant to continue its occupancy of the upper room of the old build-

ing, according to the terms of the original deed of Joel Colson.

The judgment is affirmed.

Filed May 29, 1894.

No. 16,517.

WERLEY ET AL. *v.* THE HUNTINGTON WATERWORKS COMPANY.

138 148
162 403

WATERWORKS COMPANY.—*Appropriation of Land.—Water Privileges.—New Appraisement.—Exceptions to, Duty of Court to Hear.*—A new appraisement in a proceeding by a water works company, to appropriate to its use real estate and water privileges, is made in the same manner as the first appraisement; and where exceptions are duly filed to the new appraisement, it is reversible error for the court to refuse to hear the exceptions.

SAME.—*Appraisement.—Exceptions.—Duty of Court to Hear.*—Where exceptions are duly filed to an appraisement, the court must first determine whether right and justice require a new assessment, if that question is properly raised by the exceptions.

NEW TRIAL.—*When Motion for is not a Prerequisite to Review of Errors.—Practice.*—It is only where there has been a trial that a motion for a new trial is required as a condition precedent to a review of errors in this court affecting the trial.

From the Huntington Circuit Court.

R. A. Watkins and *R. A. Kaufman*, for appellants.

J. B. Kenner and *U. S. Lesh*, for appellee.

MCCABE, J.—This was a proceeding by the appellee against the appellants, to appropriate certain real estate and water privileges for the use of said company, in the circuit court. The proceeding was instituted by filing an instrument of appropriation in the office of the clerk of that court.

The proceeding was had under the act of the Legislature, approved March 6, 1889, Acts of 1889, p. 195.

The third section thereof provides, among other things, for the filing of an instrument of appropriation by an incorporated company, in the office of the clerk of the circuit or other court, describing lands and water privileges needed for the use of such company, and a delivery of a copy thereof to the owner or owners of such lands, water privileges, and rights; and that thereupon the judge of the circuit, or other court of record, in the county where the land or water lies, or any judge thereof in vacation, shall, on application of either party, appoint by warrant three disinterested freeholders of such county to appraise the damages which the owners of the lands, water rights, easements, lakes, and natural streams of water may sustain by such appropriation. Such appraisers are required to be sworn, and consider the injury which such owner may sustain by reason of such appropriation, and forthwith return their assessment of damages to the clerk of such court, setting forth the value of the property taken or injury done, which they shall assess to the owner or owners separately. And that thereupon the company shall tender the amount thus assessed, to the party * in whose favor such damages are awarded, or shall pay the same in trust to said clerk; that on making payment or tender thereof it shall be lawful for such company to hold the interests in such lands and waters so appropriated.

It then provides that: "The cost of such award shall be paid by such company. * * The award of said appraisers may be reviewed by the circuit court or other court in which proceedings may be had, on written exceptions filed by either party in the clerk's office, within ten days after the filing of such award, and the court shall make such order therein as right and justice may require, by ordering a new appraisement on good cause shown: *Provided*, That notwithstanding such appeal,

such company may take possession of the property therein described for the purposes for which it was condemned, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed."

The first appraisers, appointed by the judge in vacation, made and reported their appraisement under oath; and within ten days after the filing of such appraisement, in which they assessed the appellants' damages at $800, the appellee filed exceptions thereto. The court, with the consent of appellants, sustained said exceptions, set aside said award, and appointed three new appraisers, who, under oath, made a new appraisement, awarding appellants $700 damages. Within ten days after filing the same in the clerk's office, the appellants filed exceptions to such award on the ground:

1. That the damages assessed are too small and should have been $1,000.

2. That the appraisers were unduly influenced and biased by the appellee by means of a promise made by appellee's agents to the appraisers to open a direct public highway from said premises to said city of Huntington.

3. That the appraisers did not impartially appraise the damages which appellants would sustain.

4. That William McGrew accompanied the appraisers on their view of said premises, and induced the appraisers to believe that said appropriation would not deprive the owners of the use of the premises to be appropriated, and that the possession thereof would not be for the exclusive use of appellee, but that appellants would derive great benefit by having a public highway from said premises to Huntington, and that that convenience would partially compensate appellants for the loss of their land.

5. That some of the appraisers refused to make ex-

amination of the quality of the gravel in a bank on the land to be appropriated, to learn its real value.

6. That said award * * did not properly describe the premises to be appropriated.

7. That the award is contrary to law, in that it does not set out severally what each owner is damaged.

The appellants moved the court to call a jury to try these exceptions, or that the court would hear and try the exceptions itself. The court overruled this motion, declined to call a jury to try the questions of fact involved in these exceptions, and declined to hear or try said exceptions, or to grant appellants any hearing thereon whatever, and at the request of the appellee, and over the objection and exception of appellants, confirmed the appraisement and award last rendered without any hearing, and overruled the exceptions thereto. This ruling is assigned for error.

We see no escape from the conclusion that this was error. We do not say that the appellants were entitled to a jury trial on the exceptions. We are inclined to think they were not so entitled. *Beynon* v. *Brandywine, etc., Turnpike Co.*, 39 Ind. 129.

But they were entitled, under the statute quoted, to file exceptions to the award, and have that award reviewed by the court on such written exceptions, and on such review it is made the duty of the court to make such order therein as right and justice may require by ordering a new appraisement.

In *Swinney* v. *Ft. Wayne, etc., R. R. Co.*, 59 Ind. 205, at page 218, it was said: "Should a new appraisement be granted by the court, when returned, it will be open to the same proceeding as a first one would be."

A new appraisement must be held to mean and to contemplate the same sort of a proceeding that the first appraisement was. That is an appraisement by three dis-

interested freeholders to be appointed by the circuit or other court, or the judge thereof in vacation. If, on the hearing of the exceptions to the award, the court should be of opinion that right and justice do not require any new appraisement, then the exceptions to the award should be overruled and the award or appraisement confirmed and judgment rendered accordingly. But this can not be done over the objections of the excepting party until the court has passed on the question whether right and justice require a new appraisement, if that question is properly raised by the exceptions.

Several of the exceptions raised that question. They show that the appraisers were induced, by appellees, to assess the damages at $300 less than what they actually were by telling the appraisers that the appropriation would not deprive the owners of the use of the land and that appellants would derive great benefit by having a public highway to Huntington from said premises, resulting from the appropriation, and that such convenience would partially compensate the appellants for the loss of their land. The truth of these exceptions stands unchallenged. And appellee, by asking the court to disregard and refuse to hear them, in effect admits their truth. If they are true, right and justice require a new appraisement, as they state facts enough to make good cause shown therefor.

Counsel for appellee contend that appellants, by consenting to the setting aside of the first award and the appointment of new appraisers, who made an assessment of the damages, have had their day in court, and can not have another assessment by new appraisers. If such contention can be maintained, then it would result that the first assessment would give both parties a day in court, and would preclude either of them from filing ex-

ceptions and obtaining a new appraisement. Such a result would be in direct contravention of the statute.

It is further contended by the appellee that the failure to move for a new trial, assigning as a cause therefor the refusal of the court to hear and consider such exceptions, is a waiver of the error, and precludes this court from considering the same on this appeal. But the principle invoked has no application, because there has been no trial, the court refusing to hear and try the only question there was to try. It is only where there has been a trial that a motion for a new trial is required as a condition precedent to a review of errors in this court affecting the trial.

For the error in refusing to hear the exceptions by the court, the judgment is reversed, the cause remanded, with instruction for further proceedings in conformity to this opinion.

DAILEY, J., took no part in this decision.

Filed May 29, 1894.

No. 16,742.

FLORA *v.* RUSSELL ET AL.

138	153
142	489
143	704
138	153
148	586
138	153
155	55
138	153
167	548

MALICIOUS PROSECUTION.—*Suspicion or Belief of Guilt.—Probable Cause.*—Mere suspicion, or even belief, that a person has committed a crime, based upon circumstances in themselves innocent, is not, in an action for malicious prosecution, sufficient to show probable cause.

SAME.—*Advice of Prosecuting Attorney.—When it will Protect.*—The procuring of a warrant, upon the advice of the prosecuting attorney, will not protect against an action for malicious prosecution, unless the facts within the knowledge of the prosecuting witness are fully and fairly stated to such attorney.

SAME.—*Railroad Company.—Liability for Acts of Employes.*—A railroad

company is liable, in an action for malicious prosecution, for the acts of its employes within the scope of their employment and in the interest of the company.

SAME.—*Scope of Employment.—Acts Without.*—A check clerk at a railroad station, working under the local freight agent, is not, without more shown, acting within the scope of his employment when he procures a search warrant to discover property stolen from the railroad company.

From the Knox Circuit Court.

W. A. Cullop, C. B. Kessinger and *J. S. Pritchett*, for appellant.

W. M. Ramsey, L. Maxwell, Jr., R. Ramsey and *E. Barton*, for appellees.

HOWARD, J.—The appellees had caused a search warrant to be issued, under authority of which the home of appellant was entered and searched for a butt of tobacco, claimed by appellees to have been stolen by appellant from a car of the appellee, the Ohio and Mississippi Railway Company. No such tobacco was found in or about the residence of appellant.

This action was then instituted by the appellant. The complaint was in three paragraphs, the first counting upon malicious prosecution; the second, upon libel; and the third, upon trespass. A demurrer was overruled to the first paragraph of the complaint, but sustained as to the second and the third, which latter rulings are assigned as error. The demand in each paragraph was for five thousand dollars. The jurisdiction is in this court. Elliott's App. Proced., section 59; *Flora* v. *Russell*, 31 N. E. Rep. 936.

General denials being then filed to the first paragraph of the complaint, the cause was submitted to a jury. The evidence for the plaintiff having been given, appellees demurred to the evidence, whereupon the jury returned a conditional verdict of damages in

the sum of five hundred dollars for appellant; and the demurrer to the evidence was taken under advisement by the court. Afterward the court sustained the demurrer to the evidence, set aside the verdict of the jury and rendered judgment in favor of the appellees.

Many questions are discussed by counsel, but we are of opinion that all questions so discussed are merged in the consideration of the court's ruling on the demurrer to the evidence. From the evidence, it appears that H. A. Truedly was at the time freight agent of the appellee railroad company, at Vincennes, and had been so acting for over two years.

The appellee Russell was an employe of the company, being check clerk, and working under Truedly. He had been so employed for two years, and had been an employe of the company for sixteen years. William H. DeWolf was the local attorney of the company, and had been for ten or fifteen years.

On the morning of February 24, 1890, Truedly learned from Russell, and from another employe named Drulinger, that a car had been broken into and a butt of tobacco taken. One Metzger, a city policeman, had told Russell that he suspected a man named Flora. Metzger added that Flora's house had been lit up during the night, and there was knocking around, and he had watched the place a while, and he advised Russell to go and get out a search warrant. Drulinger told Russell the same thing. Russell got all the bills and checked the freight in the car, and found a box of tobacco short, and Drulinger then resealed the car. On this information Truedly gave Russell a note stating the case, to take to DeWolf, the attorney, and to see him about the matter, telling Russell at the same time that he suspected Flora. DeWolf wrote a letter and gave it to Russell to take to

the prosecuting attorney. Russell gave DeWolf's letter to the prosecuting attorney, and also told the prosecuting attorney that tobacco had been stolen from the O. and M. the night before; that he was one of the employes of the company, and had been looking the matter up, and thought he knew who the parties were; that he had information from the police, mentioning Metzger, that Flora had lights in his house during the night, and there was noise as if they were putting up boxes; and that the police believed the tobacco was in the house. The prosecuting attorney also read the letter from the company's attorney, and told Russell if these facts were true, if Metzger was right, it was a clear case, and advised that a search warrant be issued. They then went before the mayor where the following affidavit was sworn to by Russell:

"George Russell swears that on or about the 23d day of February, 1890, at said county, one ——— Flora, whose Christian name is unknown to this affiant, did then and there unlawfully and feloniously steal, take and carry away one butt of tobacco, of the value of ten dollars, of the personal goods and property of the Ohio and Mississippi Railway Company, as affiant verily believes, and this affidavit is made to obtain a search warrant, and not from anger or malice."

Upon this affidavit, a search warrant was placed in the hands of two officers, who made thorough search of the house of appellant, including cellar and other rooms, stable, trunks, bed, bureau drawers, etc. The appellee was absent at work when the search was made.

The following return was made to the warrant: "Come to hand February 24, 1890. In obedience to this writ, I, the undersigned city marshal, with the assistance of William Hall, went and searched the said premises of

Flora, and found no goods of the description mentioned in affidavit. This 24th day of February, 1890.

"Louis Hahn, City Marshal."

The evidence showed that there was sickness in the family of the appellee, for which reason there had been light in the house, and the parents were up taking care of their children during the night. The good character of the appellee was proved by many witnesses.

In *Carey* v. *Sheets*, 67 Ind. 375, it was said, quoting from Wharton's Criminal Law, section 2942, that one who maliciously and without probable cause procures a search warrant to be issued, will be liable as for a malicious prosecution.

In the same case, it is said that express malice need not be shown; but that malice may be inferred from the want of probable cause. Citing 4 Wait Actions and Defenses, 345, 346; 2 Greenleaf Ev., section 453; *Oliver* v. *Pate*, 43 Ind. 132; *Lockenour* v. *Sides*, 57 Ind. 360. See, also, *Bitting* v. *Ten Eyck*, 82 Ind. 421; *Pennsylvania Co.* v. *Weddle*, 100 Ind. 138; *Heap* v. *Parrish*, 104 Ind. 36.

Going back to the evidence which might show probable cause, we notice that Truedly, the agent of the appellee company, received his information from the appellee Russell and the watchman, Drulinger, both employes of the company. Russell obtained his information from Metzger, a city policeman, a relative of Russell's. Metzger said "he had suspicions of one Flora." It was Metzger who told him, also, that Flora's house had been lit up, and that there were noises about it the night before, and that he had watched the place. Drulinger told Russell the same that Metzger told him. Flora lived several squares away from the depot. Russell's knowledge that a butt of tobacco was stolen was derived from a checking off of the bills of freight that should be in the car, when he found the tobacco short.

This was the information communicated to the agent, Truedly, and on the basis of which the prosecution was instituted.

The evidence shows no reason why Truedly or Russell suspected Flora. The watchmen who saw the light in the house and heard the noise there do not say how it was they connected Flora with the taking of the tobacco. The evidence discloses no probability whatever as to Flora's taking any tobacco. That there was light in his house and some noise there is all that seems to have drawn suspicion to him more than to any other inhabitant of the town.

It is said, however, that the prosecuting attorney advised the issue of the warrant, and that this is sufficient to show the absence of malice and want of probable cause.

In *Lytton* v. *Baird*, 95 Ind. 349, it was said that "The mere fact that a party procures and acts upon the advice of an attorney so obtained, does not of itself exempt him from liability, or afford absolute justification of the prosecution. * * * It is merely competent evidence tending to rebut malice and the want of probable cause. *Smith* v. *Zent*, 59 Ind. 362; *McCarthy* v. *Kitchen*, 59 Ind. 500. In *Scotten* v. *Longfellow*, 40 Ind. 30, it was held that such advice, to afford any protection, must be given upon a full and true statement of all the facts within the knowledge of the person seeking the advice."

The appellee, Russell, says that he told everything that he knew to the prosecuting attorney, and that in making the affidavit he acted upon that official's advice. But the evidence of the prosecuting attorney shows that his evidence was based upon a much broader state of facts than, as we have seen, Russell himself was in possession of. Russell's evidence shows that he knew nothing but what was told him by Metzger and Drulinger,

which was that they suspected Flora; that they saw light and heard noise in Flora's house the night before. But the prosecuting attorney, in his testimony, says that Russell told him "that he was in the employ of the company, and had been looking up the matter and thought he knew who the parties were. He said to me he had information from the police, * * * and I read this letter which he had from Mr. DeWolf, and we then proceeded to the mayor's office." While waiting in the mayor's office they talked the matter over again, "and he again alluded to the fact what the police had told him. I told him if these facts were true he had better make an affidavit for a search warrant." It is very evident that the case, as presented to the attorney, was upon a very different set of facts from the vague suspicion communicated to Russell by Metzger and Drulinger, and this suspicion, for aught that appears, based only on the light and movements in a house visited by sickness. The facts upon which the prosecuting attorney's advice was based were the letter from the company's attorney, the looking up of the matter by Russell, an employe, his belief that he knew who the parties were, and that he had information from the police. When, however, Russell himself came to testify, he had no such information, nor had the police given him any information; but on the vaguest and most unfounded suspicion the suggestions of the superserviceable watchman passed first to Russell, then to the agent, Truedly, from him and Russell to the attorney, DeWolf, and from DeWolf and Russell, still growing as they went, like the three black crows, until they finally came as a full fledged narrative to the prosecuting attorney. And then the officers, with the search warrant, start for Flora's house to find him away at work, and no tobacco concealed in any corner of the poor, but apparently honest, little household. It is

only when the facts within the knowledge of the prosecuting witness are fully and fairly stated to the attorney that his advice will be any protection. *Paddock* v. *Watts*, 116 Ind. 146.

The mere suspicion which was communicated to Russell was no justification for his affidavit. Even if he had believed Flora guilty, that would be no protection. It is only when there is reasonable and probable cause for instituting criminal proceedings that the prosecuting witness will be free from liability. *Graeter* v. *Williams*, 55 Ind. 461, and cases there cited.

It is contended, by counsel for appellees, that even if Russell should be liable in this case, yet the liability would not extend to the appellee company. The persons who procured the institution of the proceedings against Flora were all agents and employes of the company; and it would seem that each was acting within the scope of his employment and in the interests of the company. Truedly was the agent in charge of all the freight business of the company at Vincennes. Russell was under Truedly, and was check clerk of freight. De Wolf was the local attorney. It would appear that what was done by each of them in this matter was done in the interests of detecting the theft of the company's property; and that the search warrant was issued to discover and reclaim that property. It would, therefore, seem that the company would be liable as principal.

In *Evansville, etc., R. R. Co.* v. *McKee*, 99 Ind. 519, it was held that where a railroad company employs an agent to detect, arrest and prosecute persons who unlawfully obstruct its track, and the agent, acting in the scope of his employment, arrests an innocent person, the railroad company is liable therefor. See, also, Story Agency, section 452; *Philadelphia, etc., R. R. Co.* v. *Derby*, 55 U. S. 467; *Lynch* v. *Metropolitan, etc., R. W.*

Co., 90 N. Y. 77; *Chicago, etc., R. R. Co.* v. *Flexman*, 103 Ill. 546; *Palmeri* v. *Manhattan R. W. Co.*, 133 N. Y. 261; *Dickson* v. *Waldron*, 135 Ind. 507; *American Express Co.* v. *Patterson*, 73 Ind. 430.

The majority of the court, however, are of opinion that it does not appear that, in instituting the proceedings for a search warrant, Russell was acting within the scope of his authority as agent of the company.

The judgment is therefore affirmed as to the Ohio and Mississippi Railway Company, and is reversed as to the appellee Russell, with instructions to overrule the demurrer to the evidence as to the said Russell, reinstate the verdict as to him, and render judgment thereon in favor of the appellant against the appellee Russell.

Filed May 29, 1894.

No. 16,593.

HARTER, ADMINISTRATRIX, ET AL. *v.* SONGER.

138 161
152 562
152 563
152 564

DECEDENT'S ESTATE.—*Setting Aside Final Settlement.—Partnership.—Judgments.—Payment by Partner.—Subrogation.—Pleading.—Parties.—Misjoinder of Causes of Action.—Motions to Make Specific.*—A complaint by S. to set aside an administrator's final settlement alleged that S., I., and W., the decedent, were partners until the latter's death; that upon the death of W. the firm was indebted in the sum of $4,000; that during the administration of W.'s estate judgments aggregating more than $3,000 were rendered against the estate and S. and I., upon said indebtedness; that all the assets of the firm had been exhausted in paying other indebtedness; that W. left property, real and personal, to the value of $10,000, with no debts except those of the firm, and that his heirs, the other defendants, took, and have since held, possession of said property; that the administrator refused to pay any part of the judgments, and S. was compelled to pay the same to protect his own property; that intending to prevent the plaintiff from filing a claim against the estate for the sums

so paid, the administrator had filed and procured the approval of a final settlement report, without any showing that the judgments had been paid and without paying them; that the plaintiff and the judgment creditors had no actual knowledge or notice of the filing or approval of said report, and were not present in court. While there were incidental allegations as to subrogation, the only relief granted was the setting aside of the report.

Held, That there was no error in overruling the motion to make the allegations as to the property left by the decedent, and as to the exhaustion of the firm's assets, more specific.

Held, also, That there is no harmful misjoinder of causes of action. (Section 341, R. S. 1881.)

Held, also, That I. was not a necessary party to the action.

Held, also, That the complaint is good as against a demurrer for want of facts.

Held, also, That the payment of the judgments by the plaintiff did not extinguish them, but that, under the statute (sections 1214 and 1215, R. S. 1881), they remained in force for the benefit of S.

Held, also, That under the statute it is not necessary that the whole debt should have been paid at the time of the settlement, but that it is sufficient if it has been paid when contribution is sought.

PLEADING.—*Motion to Strike Out.*—Where a complaint contains pertinent facts sufficient to support the judgment, no available error can be predicated upon the overruling of a motion to strike out other and immaterial facts.

From the Fountain Circuit Court.

V. E. Livengood and *S. F. Wood*, for appellants.

H. H. Dochterman and *D. Simms*, for appellee.

HACKNEY, C. J.—This was a suit by the appellee to set aside a final settlement by the appellant, administratrix of the estate of John Wertz, deceased.

Motions by the appellants to make more specific and to strike out parts of the complaint were overruled, and a demurrer to the complaint was overruled.

The appellants failing to plead further, the court rendered judgment for the appellee setting aside said settlement.

The appellants complain, in this court, of said several adverse rulings of the lower court.

The complaint alleged the existence of a copartnership, consisting of the said John Wertz, the appellee and one Isley, from February, 1880, until the death of said Wertz, in 1883; that the interests in the copartnership and its liabilities were, Wertz, three-eighths; Songer, one-eighth, and Isley, one-half; that upon the death of said Wertz, and the dissolution of said copartnership, there was an outstanding indebtedness due from the firm in the sum of four thousand dollars; that during the administration of said estate by the appellant Harter, several judgments were rendered against said estate, and the said Songer and Isley, upon said indebtedness aggregating more than three thousand dollars; that all of the assets of the copartnership had been exhausted in paying other indebtedness of the firm; that said Wertz left property, subject to the payment of his liabilities, to the value of ten thousand dollars, and left no indebtedness other than that of said firm; that said administratrix neglected and refused to pay any part of said judgments or to convert real estate of the decedent, necessary for that purpose, into cash, and that to protect his own property from sale, upon execution, to satisfy said judgments, the appellee was required to, and did, pay them in full from his separate means.

It is further alleged that on October 23, 1891, said administratrix, intending to prevent filing of claims against said estate by the appellee for the sums so paid, filed and procured the approval of a final settlement report of the administration of said estate, without any showing that said judgments had been paid, and without paying any part thereof, and that the appellee and said judgment creditors had no actual knowledge or notice of the filing or approval of said report, and was not present in court in person or by attorney.

It is incidentally alleged that he is entitled to subro-

gation as to the sums so paid on behalf of said estate, but the judgment of the court did not declare subrogation, and did not grant a recovery in any sum.

The allegations sought to be made more specific were as to the ownership, by the decedent, of real and personal property, and that after his death the appellants, his descendants, took, and have since held possession thereof, and that all of the firm assets had been exhausted in paying firm liabilities. The ownership of property, in addition to that which was alleged to have gone into the hands of the administratrix, was but an incident to the right to have the final settlement set aside, since it was the duty of the administratrix to have paid upon the judgments that proportion of the funds coming into her hands, to which such judgments with other claims against the estate were entitled, even if the estate had not been solvent. The action was not to recover from the heirs any of said property, nor was it to subject said property to the payment of the appellee's claims. The decree entered does not preclude the appellants from controverting the facts as to the extent and value of the property received by them severally, and this fact, of itself, shows the little importance of specific allegations as to the extent and value of such property so alleged to have been taken and held by the appellants severally. The allegations sought by the motion, as to the particular debts, amounts, and persons to whom paid, in exhausting the firm property, would, like those with reference to the property taken by the appellants, have been but evidentiary facts, and not necessary to the sufficiency of the complaint to set aside the final settlement. There was no error in overruling said motion.

The motion to strike out parts of the complaint was sustained in part, and overruled in part, and it is urged

that it was error to overrule the motion in part. It is rarely available error to overrule a motion to strike out, and it is certainly not reversible error when the alleged irrelevant matter does not, as in this case, supply the basis of the judgment. If the complaint can be said to have contained pertinent facts sufficient to support the judgment, no error can be predicated upon the motion to strike out other and immaterial facts. We come now to a consideration of the sufficiency of the complaint upon the demurrer of the appellants. The grounds of demurrer were four, namely: Want of sufficient facts; nonjoinder as plaintiff of Isley; nonjoinder of Isley as defendant; and misjoinder of causes of action. The last of these grounds is presented upon the theory that the relief sought was not only to set aside the settlement, but to declare the right of subrogation, and for judgment thereon.

It is conceded that under section 341, R. S. 1881 (344, R. S. 1894), the judgment could not be reversed upon this alleged error. In the absence of this provision of the statute, where the judgment adopts the theory of the complaint as presenting but a single cause of action, and does not extend relief upon the supposed erroneously joined facts, it would be difficult to see how the parties could be prejudiced. The judgment before us, it will be remembered, was without an issue joined, and the record presents no question of error in admitting evidence of such supposed second cause of action.

As to the second and third grounds for demurrer, it may be said that the only possible reason for making Isley a party would be upon the conclusion that he was jointly interested in the relief sought by the complaint. If interested in opening the settlement to enforce a right held in common with Songer, perhaps he should have been a complainant, and refusing to join as such should have

been a defendant. However it does not appear from the facts alleged, that Isley held any interest whatever in the claim for three-eighths of the judgments paid by Songer on the proportionate liability of Wertz, nor does it appear that Isley was jointly liable with the Wertz estate for such proportion. If Isley were a complainant with Songer against the Wertz estate, upon the facts alleged he would be entitled to no interest in the recovery for payments by Songer for Wertz, and if he were a defendant, with the Wertz estate, Songer could recover no joint judgment against him and such estate. Isley was not, therefore, a necessary party to a recovery of the sums owing, if any, by the Wertz estate to Songer. *Olleman* v. *Reagan's Admr.*, 28 Ind. 109; *Voss* v. *Lewis*, 126 Ind. 155. And it does not appear that he was a necessary party to the preliminary action to set aside the settlement.

The remaining question is as to the sufficiency of the facts pleaded to authorize the remedy extended. It is conceded that, under R. S. 1881, sections 2402, 2403; R. S. 1894, sections 2557, 2558, if the appellee was interested in the estate, and did not appear at the final settlement, and was not personally summoned to attend the same, he could have such settlement, or so much thereof as affected him adversely, set aside, and the estate reopened within the time prescribed. It is insisted, however, that the appellee had no interest in the estate; that the payment of the judgment was in part before the settlement and in part after the settlement; that to entitle the appellee to enforce contribution at the time of the settlement, it was necessary to show that it had fully paid the judgments; that the payment of the judgments by one of several joint judgment debtors was a complete discharge of the judgments, and cut off any right of subrogation, and that under the R. S. 1881, sections 1214,

1215; R. S. 1894, sections 1228, 1229, no right of subrogation was provided to a principal in a judgment as against one of his co-principals.

The final settlement having been made in the face of judgments against the estate, the existence of which was well known to the administratrix, not only were the judgment creditors interested in the estate to the amount of the unpaid balances of the judgments, but Songer was interested to the extent of the ratable proportion of such judgments owing by said estate.

The administratrix was not the representative alone of the descendants of Wertz. She was charged under her oath and her bond, as well as by the dictates of common honesty, to pay, so far as the assets permitted, all just debts and legal claims against the estate seasonably presented and filed, as required by law. She was in this sense the trusted representative of such creditors. The judgments were rendered against the estate seasonably, and no fact or circumstance is alleged or suggested as excusing their payment before closing up the estate. The failure to do so was a palpable violation of duty, and it is with no reason that it is urged that the failure of Songer to pay the judgments, and, at least thirty days before the final settlement, to file his claim for contribution, may excuse the administratrix from the failure to perform a plain duty. The liability of the estate existed and, by solemn adjudication, had passed beyond dispute; this liability could neither be avoided nor discharged by the filing and approval of a final settlement report. Such settlement, if the claim had been seasonably filed, but not passed upon, would not stand,—*Dillman* v. *Barber*, 114 Ind. 403–405; *Heaton* v. *Knowlton*, 65 Ind. 255,—and much less could it stand where the claim had been properly reduced to judgment. But it is said that notwithstanding the unauthorized settlement the payment by

Songer relinquished the claim against the estate, and that such claim could not, in equity nor under the statutes, be kept alive for the benefit of Songer. Equity would, indeed, be but weak if it could not protect the joint judgment debtor against a fraud so palpable, but we need not resort to a consideration of equitable remedies. By the sections of the statute last cited, the interest of Songer in the estate is not only defined but is protected.

By section 1214, *supra*, it is provided that "when any defendant-surety in a judgment * * * shall be compelled to pay any judgment or any part thereof; or shall make any payment which is applied upon such judgment by reason of such suretyship, * * * the judgment shall not be discharged by such payment, but shall remain in force for the use of the * surety, and, after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use."

By section 1215, *supra*, it is provided that "Any one of several judgment-defendants * * * having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the co-defendants or cosureties, to collect of them the ratable proportion each is equitably bound to pay."

Here, we find that, in the absence of superior equities, the joint judgment debtor who pays the judgment has the same remedies given to sureties. In some of the cases it has been held that the payment extinguishes the judgment, and so it does as to senior equities, and as to those whose separate rights and liability have not been established in and by the judgment, but it is nowhere held that the basis of the judgment has been so far swept away as to leave no claim for the debtor who has made such payment, nor is it true that the position of a surety is more favorable than that of a joint debtor. If the suretyship has been established by the judgment, an exe-

cution is the remedy of the surety who pays the judgment,—*Hogshead* v. *Williams*, 55 Ind. 145,—while if the suretyship has not been so established, the judgment will be held, *prima facie*, to have been extinguished by the payment,—*Kreider* v. *Isenbice*, 123 Ind. 10,—but this *prima facie* holding, if made conclusive, would defeat the letter and the spirit of the statute, consequently the rule of the statute is that "the judgment shall not be discharged by such payment, but shall remain in force for the use of the * surety."

But to avoid the *prima facie* discharge of the judgment, where the relation of surety is not shown by the judgment, proceeding must be had to establish that relation.

By the express provision of section 1215, *supra*, the same remedy is provided for any one of several judgment debtors who may pay the creditor's judgment. Therefore, if subrogation is provided by the statute for sureties, it is also provided for a joint principal. If *prima facie* extinguishment of the judgment may be rebutted as to a surety, so it may as to a joint principal. If this is not true section 1215, *supra*, has no force whatever. *Laval* v. *Rowley*, 17 Ind. 36, and cases following it, cited by appellants, do not conflict with our view here taken.

It was not necessary, under these statutory provisions, that the whole debt should have been paid at the time of the settlement, it is quite sufficient if it has been paid when contribution is sought. For none of the reasons urged by appellants was the complaint subject to the demurrer.

The judgment of the circuit court is affirmed.

Filed May 29, 1894.

38 170
45 630
46 522

No. 16,761.

The Jeffersonville Water Supply Company *v.* Riter et al.

Mechanic's Lien.—*Purchaser of Real Estate.—Liability of.—Complaint.*—A complaint to enforce a mechanic's lien under the act of 1883 is sufficient as to a purchaser of the real estate if it shows that the furnishing of materials commenced prior to the transfer.

Same.—But a complaint against A to enforce a mechanic's lien, which shows that the contract was made with B prior to a conveyance of the land to A, is bad if it fails to show that materials were furnished or labor done while the title was still in B.

Same.—*Failure of Purchaser to Record Deed.—Notice.*—The right to assert a mechanic's lien is not affected by the failure of a purchaser of the real estate to have his deed recorded, whereby notice of the transfer is not acquired until after the work is begun.

Same.—*Sufficiency of Notice.—Time of Completion of Work.—Pleading.*—A general allegation that notice of intention to hold a lien was filed "within sixty days after furnishing the material and doing the work" is sufficient under the statute and is not controlled by special averments showing that the work was submitted to inspection and test at an earlier day, if it also is shown that defects were thereby disclosed which postponed its actual completion to the date alleged.

From the Floyd Circuit Court.

A. Dowling, for appellant.

J. H. Stotsenburg, *E. B. Stotsenburg* and *S. S. Johnson*, for appellees.

Howard, J.—This was an action brought by the appellees to enforce a mechanic's lien, and for the collection of a balance of nearly four thousand dollars alleged to be due on a contract for the erection of a standpipe for a system of water works.

The complaint was in four paragraphs, to which separate demurrers were overruled, as were also separate motions to strike out the notice of lien and all allegations

in connection therewith, in the second, third and fourth paragraphs of the complaint.

The appellant answered in general denial of each paragraph of the complaint, and also filed interrogatories which were answered by the appellees.

The venue was changed from Clark to Floyd county, and there was a trial before the Honorable George V. Howk, judge of that circuit, who took the cause under advisement, but who died before announcing his finding. The case was then, by consent, submitted, on the same evidence, to the honorable judge below, who returned his special finding, as requested by the appellant, with conclusions of law thereon, in favor of the appellees. Judgment was rendered in accordance with the conclusions of law.

It is alleged, in the first paragraph of the complaint, that on April 6, 1888, Samuel R. Bullock, who was a codefendant of the appellant in the court below, but who does not appear as a party to this appeal, owned a certain described lot in Port Fulton, Clark county, Indiana; that on said day the appellees and said Bullock entered into an agreement to the effect that appellees should furnish the materials for and erect a standpipe on said lot for a water works system for the city of Jeffersonville; that on April 10, 1888, the work of furnishing material for said standpipe commenced, and the same was completed on December 1, 1888; that the agreed price of the work was $8,072, and, on October 10, 1888, the sum of $4,000 was paid upon said amount, and the further sum of $86.03, as freight on material, was also paid, leaving due and unpaid $3,985.97; that all material furnished by appellees in the construction of said work was used in said standpipe upon said lot; that on the 4th day of December, 1888, and within less than sixty days after said material was furnished and said standpipe finished, the

appellees filed in the recorder's office of the county a notice of their intention to hold a lien on said property for the amount of their said claim, setting forth also a description of the property; that the notice was duly recorded, and a copy is filed with the complaint; that on April 21, 1888, the said Bullock and his wife conveyed said real estate to the appellant, who is now the owner of and using and operating the same.

The mechanic's lien law, in force during the time the alleged work was done, was the act approved March 6, 1883 (Acts 1883, p. 140; Elliott's Supp., section 1688 and following; section 7255 and following, R. S. 1894).

It is insisted that under provisions of said act, the demurrer to the first paragraph of the complaint should have been sustained as to the appellant, "for the reason that it does not appear that any materials were furnished or any labor performed by the appellees before the conveyance of the lot by Bullock to appellant;" and many authorities are cited to show that "the alienation of the real estate before any labor is performed or materials are furnished; defeats the right of a mere contractor for labor and materials to subject the property in the hands of a purchaser to the statutory lien for labor done and materials furnished after such alienation of title."

The contention of appellant would undoubtedly be good under the authorities cited, if it were in fact true that the paragraph of complaint showed that the materials were furnished and the work done after the conveyance of the land. But it is expressly alleged that the conveyance from Bullock to appellant was made "by deed dated April 21, 1888." It is likewise alleged "that on the 10th day of April, 1888, the work of furnishing material, etc., for said standpipe commenced, and materials for the same were furnished."

As said in appellant's brief, "the language of the act

of 1867, as to the priority of mechanics' liens, is substantially the same as that of the act of 1883. In *Fleming* v. *Bumgarner*, 29 Ind. 424, the court gave a construction to the act of 1867, and said: 'A fair construction of the law is, that the lien of the mechanic or material man relates to the time when the work commenced, or the materials began to be furnished, as to subsequent conveyances as well as to other liens.'

This construction of the law was approved in *Kellenberger* v. *Boyer*, 37 Ind. 188, and the court added, citing other authorities: 'A subsequent transfer of the property ought and does not affect the lien after work has actually been begun.'"

For a full discussion of this subject see Phillips Mech. Liens, Chap. XIX.

We are of opinion that the first paragraph of the complaint is not subject to the objection urged by the appellant under his demurrer. At most, the allegation relating to work and material would be subject to a motion to make more specific as to the nature of the work and the place of furnishing the material.

The second paragraph of the complaint is quite similar to the first. It is further alleged in this paragraph, that the appellees had no actual knowledge of the transfer of the lot from Bullock to appellant until the completion of the work. This allegation is lacking in clearness, and was also subject to a motion to make more specific. The reasonable inference, however, is that appellant failed to put its deed on record until the completion of the work. It is not easy to conceive any other legal reason why appellees should have no knowledge of the transfer of title. Appellant could not, by concealing its deed, defeat the lien of appellees, even if the material were not furnished nor the labor done until after the transfer of title. For this purpose there need

not have been intentional fraud on the part of Bullock or appellant; but if, by the fault or mistake of appellant, appellees were kept in ignorance of the transfer of title until after the labor and material were furnished, appellant could not take advantage of its own wrong to defeat the rights of appellees.

By section 3350, R. S. 1894 (section 2931, R. S. 1881), a conveyance not "recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration."

By section 3345, R. S. 1894 (section 2926, R. S. 1881), no conveyance "shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time and in the manner provided in this act."

In *Runyan* v. *McClellan*, 24 Ind. 165, under like statutes, it was decided, in effect, that such unrecorded deed is void "as to a person who has, without notice, in good faith, and for a valuable consideration, acquired a legal interest in the land." See, also, *Pierce* v. *Spear*, 94 Ind. 127.

The second paragraph of complaint was good against the demurrer.

The motions to strike out the notice of lien, and all allegations in connection therewith in the second, third, and fourth paragraphs of complaint, were correctly overruled. The reason urged in favor of these motions is that it appeared from the pleadings themselves that the notice was not filed in time. The general allegation is made in the second paragraph, that this notice was filed "within sixty days after the furnishing of the material and doing said work." Like allegations are made in the other paragraphs. There are no special statements go-

ing to show that these general allegations are incorrect. This is sufficient under the statute, section 7257, R. S. 1894 (section 1690, Elliott's Supp.).

That the work was so far done that the standpipe was ready for inspection and testing in September, 1888, but that it was not actually tested by filling with water until November, when leaks were found, which were closed by appellees, at which time the work was finally received by appellant, does not show that the work was finished in September. The contract was to furnish material and erect a standpipe as a part of a system of water works to supply the city of Jeffersonville with water for fire and other purposes. Whether this had been done could only be determined by testing the work, by putting the standpipe in actual operation, and thus discovering whether it was sufficient for its purpose as provided in the contract. Only on such a test could the work be pronounced complete, the labor performed and materials furnished. By the allegations it appears that the test showed that additional labor was in fact necessary, and that this labor was actually performed by appellees. Appellees might themselves, perhaps, complain of the delay by appellant in testing and accepting the work, but appellant is in no position to make such complaint.

The additional allegations in the third paragraph of the complaint make it somewhat uncertain upon what theory this paragraph proceeds. It is alleged that Bullock contracted with appellant to erect a system of water works, bought the land and conveyed the same to appellant in pursuance of such contract; that while he held the title to the land he entered into the contract with appellees for the standpipe; that the appellees, "about the 5th day of July, 1888, and by direction of defendants (Bullock and appellant), and in presence of, and by the

consent and knowledge of the resident officers, superintendent, and agents of said Water Supply Company, removed the same to the said real estate so conveyed to said Water Supply Company, and thereupon, in the presence of, by consent, and under the direction of said officers and agents, and superintendent, proceeded in good faith, to erect and complete said standpipe according, in all respects, to the terms of their contract; and that when completed the same was received and put into immediate use by said Water Supply Company, and became, and now is, a material and necessary part of its system of water works, and is so used by said company in supplying said city with water."

If by this it is meant that the appellees were sub-contractors, and that the appellant was owner of the land with notice of the labor performed, and the material furnished by appellees, then the allegations are insufficient under the statute then in force (section 5, Act March 6, 1883, Acts 1883, p. 140; section 1692, Elliott's Supp.), which required the sub-contractor, "at or before the time he furnishes the material or performs the labor," to notify the owner that he is so doing. Under that statute, while in force, as it was during the progress of this work, mere knowledge on the part of the owner that labor was being performed, or materials furnished for the erection of a structure on his premises, as has frequently been held, was insufficient to enable the mechanic or material man to acquire a lien. *Parker* v. *Dillingham*, 129 Ind. 542, and authorities there cited.

It is more probable, however, that the theory intended to be advanced in the third paragraph of the complaint, is that, in the contract with the appellees, and in the superintendence of the work of erecting the standpipe, Bullock represented appellant, and that all he did was

in fact done for the company, of which he was the sole and exclusive controller and manager during the building of the water works. If this were in fact true, the acts of Bullock in the premises would be the acts of the company. As to the appellees, he would be the agent and representative of the appellant; and the allegations made as to the presence, consent, and direction of the officers of appellant, in agreement with the contract, orders, direction and supervision of Bullock, would be material. *Thompson* v. *Shepard*, 85 Ind. 352; *Cannon* v. *Helfrick*, 99 Ind. 164; Phillips Mech. Liens, sections 59, 89.

But the allegations of the paragraph of complaint, as made, are not sufficient for such a theory. Neither are we able to discover any theory upon which this third paragraph can stand. It does not appear, from any allegations made therein, that any materials were furnished or labor performed while the title to the land was in Bullock; yet it is alleged that the contract for the work was made with Bullock before he conveyed the land to appellant. We think the paragraph bad on demurrer.

The fourth paragraph is much like the third. It is evidently an attempt to show that Bullock was the representative and manager of the appellant company, if not indeed the real owner and controller of its stock and franchise, and the sole director of its officers and organization during the time of the building of the water works, and particularly during the time of the erection of the standpipe.

Were the allegations sufficient to set forth such a state of facts, the paragraph would undoubtedly be good. In such a case, the acts of Bullock in the premises would be the acts of the appellant, and binding upon it as such.

As the allegations are made, however, this paragraph must also be held bad.

An examination of the finding of facts by the court shows that while the finding is well supported by the evidence, yet it is not within the issues as made in the complaint. Evidently the court based its finding upon the theory attempted to be made in the third and fourth paragraphs of the complaint, namely, that Bullock and the appellant company were, in effect, one and the same; that Bullock was the sole controller and manager of the company; that he owned all the stock except a few shares which he gave to the directors to enable them to qualify as such; that all the officers, including the superintendent or chief engineer of the works, were under the direction of, and received their pay from, Bullock, who transacted all of the business of the company.

The allegations of the complaint, however, as we have seen, set forth no such theory. If the necessary allegations were even imperfectly or defectively made, their weakness would be cured by the finding of the court. But essential allegations wholly omitted can not be supplied from the finding. A plaintiff can receive only what he asks for in his complaint, and upon the allegations of fact therein made.

The motion for a new trial should have been granted, not, as we think, because the finding of the court is not sustained by sufficient evidence, but because it is contrary to law, as not being within the issues formed by the complaint.

The judgment is reversed, with instructions to grant a new trial, and with leave to file an amended complaint.

Filed May 29, 1894.

No. 16,785.

138 179
147 303
138 179
150 483

WOOD *v.* HUGHES ET AL.

WAIVER.—*Filing Amended Paragraph After Demurrer Sustained to Original.—Practice.*—The filing of an amended paragraph of answer after the sustaining of a demurrer to the original paragraph, amounts to a waiver of the ruling on demurrer.

PLEADING.—*Cross-Complaint.—Attorney's Lien.*—Where a cross-complaint seeking to have an attorney's lien declared on certain land does not allege that the notice of lien was entered within a reasonable time after the rendition of the decree, nor that the services were of any value, it is insufficient.

Quaere, can an attorney's lien be enforced in a suit to enjoin the enforcement of a supposed legal lien by execution?

JUDGMENT.—*Objection to Form, How Made.—Waiver.—Practice.*—Objection to the form of a judgment should be raised by motion to modify, and when not so raised, it is waived.

From the Lake Circuit Court.

T. J. Wood, for appellant.

C. N. Morton, for appellees.

HACKNEY, C. J.—At the November term, 1878, of the Lake Circuit Court, one Joseph E. Young, executor, obtained a personal judgment against the appellee John M. Hughes for $15,602, including $325 as and for attorneys fees, together with a decree foreclosing a mortgage of certain real estate, securing said amount, against the appellees Hughes and wife. The appellant and another were the attorneys of the said Young in procuring said judgment and decree, and, as such, entered upon the record of said decree an attorney's lien for said sum of $325. The property was sold upon said decree for $325 less than the judgment, and thereafter, in October, 1885, the appellant, then claiming in his own behalf said lien, procured an execution to issue to the appellee sheriff for the collection of the balance of said judgment, with in-

terest, and was about to levy upon and sell property of said John M. Hughes.

This suit was instituted by said Hughes and wife to enjoin the enforcement of said execution, the complaint being in two paragraphs, the second of which only is in question here. That paragraph alleged the facts above stated, together with the additional facts that the personal judgment was rendered without the consent of said Young, and contrary to an agreement with him that no personal judgment should be taken, and upon which agreement no defense was interposed to a foreclosure; that said Hughes, upon proceedings instituted in April, 1876, was, in September, 1883, duly discharged in bankruptcy by the proper court.

It is further alleged that the attorneys' services were not worth to exceed $25, and that said Young was able and willing to pay the same.

There was an answer in general denial and by four affirmative paragraphs, to each of which a demurrer was sustained. The appellant filed, also, a cross-complaint, to which a demurrer was sustained. Upon the trial, the court found for the appellees Hughes and wife, and ordered the cancellation of said judgment, and enjoined the appellant from enforcing said execution.

The errors assigned are:

First. The overruling of the motion for a new trial.

Second. Overruling the demurrer to the second paragraph of complaint.

"Third. The court erred in sustaining a demurrer to the fifth paragraph of defendant's answer * * and for sustaining demurrer to defendant Woods' cross-complaint."

The argument of counsel is not addressed to these assignments of error, and it is doubtful if, upon the argument, any question is properly presented for review.

The third assignment of error is joint, and, under the well established practice, to become available, both of the rulings so assigned must be found to have been erroneous.

The ruling upon the fifth paragraph of answer was waived by the filing of an amended fifth paragraph of answer, to which a demurrer was overruled.

The cross-complaint sought a decree declaring a lien in appellant's favor against said land, and an order of sale thereunder. The notice of lien, pursuant to statute, was not alleged to have been entered within a reasonable time after the rendition of the decree, and, if for no other reason, the cross-complaint would have been insufficient. *Day* v. *Bowman*, 109 Ind. 383; *Alderman* v. *Nelson*, 111 Ind. 255.

Neither was it alleged that the services of the appellant and his assignor were of any value. This was also a fatal omission. *Day* v. *Bowman, supra; Adams* v. *Lee*, 82 Ind. 587; *Dunning* v. *Galloway*, 47 Ind. 182.

It is also questionable whether an action by cross-complaint to establish a lien is germane to a suit to enjoin the enforcement of a supposed legal lien by execution. In no view is there the appearance of error arising upon said third assignment.

The argument, which abounds in mere abstract statements of propositions of law, can not prevail upon the second assignment of error for at least two reasons: First. If the personal judgment against John W. Hughes was rendered in violation of an express agreement between the judgment plaintiff and himself, no suggestion is made against his right to avoid the sale of his property as upon any personal liability, and, having brought in the proper parties, it was his right to have the personal judgment set aside. This proposition is not even denied by appellant. Without the personal remedy, an execution would

not afford the relief to which the appellant would have been entitled under the decree of foreclosure—*in rem*—it is not the writ under which a decree of that nature is enforced; and, secondly, we find the following as part of an express agreement of the parties filed in this court: "It is conceded by all parties that the showing of bankruptcy proceedings in the circuit court below, by the appellees, John W. Hughes and Julia A. Hughes, * * * entitled said plaintiffs, Hughes and Hughes, to a judgment releasing them from all personal responsibility and liability on the Joseph E. Young judgment of foreclosure."

The discharge in bankruptcy was, as we have seen, set up in said second paragraph of complaint. It is perfectly clear, therefore, that the appellees were entitled to some relief upon the second paragraph of complaint, and that it was not error to overrule the demurrer to it.

Considerable space is taken in the briefs in arguing that it was error to declare the decree of foreclosure canceled. The only assignment to which this argument could possibly apply would be the first. There was no motion to modify the judgment, and no ruling in refusing to modify the judgment is assigned. Under the practice, therefore, no proper question is raised. The entry, however, shows "that the judgment * is canceled."

This, we understand, does not include the decree, but has reference alone to the personal judgment against John W. Hughes. Both sides discuss questions arising upon the statutes of limitations, which we do not find to be raised by the record. The appellant contends that the six years' limitation precluded the cancellation of the personal judgment. This limitation was not pleaded, so far as disclosed by record and assignment of error.

The appellee insists that the appellant's claim for fees

was but an open and unliquidated account at best, secured by a lien upon the decree, and that the six years' limitation against accounts would defeat an enforcement of the account and necessarily defeat the incident, the lien. No pleading in the record presents this question.

No doubt the appellant and his assignor had a lien securing their fees; no doubt that lien could have been assigned, and no doubt could have been maintained against the fund for which the land sold, or against the land. But whether the sale upon decree freed the land from the lien, and left the attorney to recourse against the fund or continued the lien against the land in the hands of a *bona fide* purchaser, are questions not before us for decision.

There is no error presented by the record, and the judgment of the circuit court is affirmed.

Filed May 29, 1894.

No. 16,860.

138 183
146 329

138 183
148 123

THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY *v.* OWENS.

REFORMATION OF INSTRUMENT.—*Deed.—Decision, When not Contrary to Law.*—The findings and conclusion of the court effecting a reformation of a written instrument (a deed), are not contrary to law, where it appears, not only by the preponderance of the evidence, but to a moral certainty, that words (a reversionary clause), by mutual mistake, were omitted therefrom, materially altering the effect of the instrument. For the evidence, see opinion.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

C. W. Griffin, *W. R. Fertig* and *H. J. Alexander*, for appellee.

The Board of Commissioners of Hamilton County *v.* Owens.

McCabe, J.—This was a suit brought by the appellee against the appellant and Lewis Kercheval, in a complaint of two paragraphs. The first paragraph was to quiet title of the appellee in and to certain real estate therein described, and the second paragraph sought to reform a certain deed on account of mistake in leaving out certain words which were intended to have been inserted. The substance of this paragraph of the complaint is that one Cook, who owned the land in controversy, sold it to the Adams Township Gravel Road Company, a corporation owning and operating a gravel road in the county, all the gravel in a certain pit situate on said real estate, and the right to remove the same for use on the road of said company, it being expressly understood and agreed between said parties that all right of said company to take gravel from said pit should cease, and the title to all such gravel as should remain should revert to said Cook, whenever its road should cease to be operated as a toll road; that the latter provision was left out of the deed by mistake of the parties thereto; that the road had been sold to the county under the statute; that the officers of the gravel road company had, without authority, embraced said real estate in the deed conveying the road to the county, and that the road had ceased to be a toll road; that appellee, through deeds from Cook to Hinshaw, and from Hinshaw to Haworth and Owens, and from Haworth to Owens, had become the owner of the land.

The cause was dismissed by appellee as to Kercheval and as to the damages claimed. Appellant answered by a general denial. Trial by the court, finding and judgment for appellee over a motion for a new trial, with a decree reforming the deed from Cook to Hinshaw, and quieting appellee's title to the property.

The only error assigned is the ruling of the court over-

ruling the motion of appellant for a new trial; and the only ground assigned for a new trial in the motion therefor, not waived by failure to argue the same, is that the decision of the court is contrary to law. The contention is that the evidence of the alleged mistake was not sufficiently clear and satisfactory, and especially that if there was a mistake at all it was not mutual, and was the mistake of one of the parties only. No other question is presented by the appellant's brief. John B. Foulk, the notary public who drew up the deed and took the acknowledgment, testified that the parties told him to put the agreement into the deed, and that that agreement was that the company was to pay Cook one hundred dollars for the gravel, and when the company ceased to be a company it was to go back to the land. The reason, he states, why he left that provision out, is that "this was done along in the evening; there was five or six deeds together and a good many mortgages made, a good many around there talking, and I was tired and just neglected to put it in. * * I did not notice the mistake; did not notice leaving out that."

The following questions to, and answers by, said witness were made:

"Then you think this mistake in this deed was your mistake, do you? A. Yes, sir.

"Q. You don't know whether it was a mistake on the part of Boatman and Teters or not?"

Boatman and Teters represented the gravel road company. His answer to that question was: "No, I couldn't account for their talk."

Cook, the grantor in the deed to the gravel road company, testified in a deposition that he proposed to the president of the company to sell to the company the privilege of the gravel for one hundred dollars, with a provision in the grant that when the Adams Gravel Road

Company should cease to use the pit the same was to go back and revert to the land. The president of the company requested Mr. Foulk to reduce the grant to writing. * * He told Mr. Foulke that they were to have a certain amount of gravel for one hundred dollars, and when they ceased to use the gravel pit for the Adams Gravel Road Company it reverted back to the land. I supposed Mr. Foulk had reduced the grant to writing, as the president had dictated it, and I just signed it without looking it over, supposing the provision was in it. I had no intention of conveying the absolute title. * I never thought of such a thing. * * * To my knowledge the president of the company had no intention of receiving such absolute title or grant."

Boatman, on behalf of appellant, testified that he was present and heard all about the terms of the purchase, but does not remember whether there was any agreement that the land was to revert after the company ceased to use it. The only testimony on that point offered and introduced by the appellant, was of that character, and to the effect that the witness heard nothing about putting a reversionary clause in the deed. Such testimony falls very far short of contradicting the appellees' evidence.

One rule in such cases contended for by appellant is: "To entitle a party to a decree of a court of equity reforming a written instrument, it must be shown that words were inserted that were agreed to be left out, or that words were omitted that were agreed to be inserted." *Nelson* v. *Davis*, 40 Ind. 366; *Allen* v. *Anderson*, 44 Ind. 395; *Baldwin* v. *Kerlin*, 46 Ind. 426; *Heavenridge* v. *Mondy*, 49 Ind. 434; *Easter* v. *Severin*, 78 Ind. 540; *Baker* v. *Pyatt*, 108 Ind. 61.

There can be no question that the evidence in the case before us complies with this rule. It shows that there

was to have been a reversionary clause inserted which was omitted by mistake of all the parties. Another rule contended for in such cases is that "relief will be granted in cases of written instruments only when there is a plain mistake clearly made out by satisfactory proofs. The rule forbids relief whenever the evidence is loose, equivocal, or contradictory, or is in its texture open to doubt or opposing presumptions." *Oiler* v. *Gard*, 23 Ind. 212(218). "Equity relieves against mistakes, * in * a written contract; and parol evidence is admissible to prove the mistake, though it be denied in the answer. But equity will not interpose in such case, unless there be the clearest and most satisfactory proof of the mistake and of the agreement between the parties." *Gray* v. *Woods*, 4 Blackf. 432. "To authorize a court of equity to reform a written instrument, on the ground of mistake, it must be established beyond reasonable controversy, and be made entirely plain, that the instrument does not express the intent of the parties." *Linn* v. *Barkey*, 7 Ind. 69. See, also, 11 Am. and Eng. Ency. Law 346; 2 Pomeroy's Equity Jur., section 859, lays down the rule thus: "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error." The evidence we have quoted above, we think, is amply sufficient under these rules to entitle the appellee to a reformation. There are many circumstances detailed in the evidence, which would needlessly extend this opinion, that when considered along with the evidence set out above renders it morally certain that the agreement was that the land was to revert when the company ceased to operate their road as a toll road, and and that such agreement was to have been expressed in the deed by a reversionary clause, and that such clause was omitted from the deed by the mistake of the drafts-

man and all the parties. The finding of the court was according to, and fully justified by, the law.

The judgment is affirmed.

Filed May 29, 1894.

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38 188
44 15
46 329
138 188
155 587

No. 16,863.

SPARTA SCHOOL TOWNSHIP OF DEARBORN COUNTY, INDIANA, *v.* MENDELL.

SCHOOL TOWNSHIP. — *Teacher.* — *Contract.* — *Mistake.*—*Reformation.*— A contract for the services of a teacher in the public schools of a township, which, as written and signed, appears upon its face to be between the teacher and the civil township, may, in an action thereon against the school township be reformed upon allegations of mutual mistake, and enforced against the latter corporation.

SAME.—*Reformation of Contract.*—*Demand.*—Where the only relief sought is the reformation of a contract, a previous demand for a correction is essential; but where, in addition to the reformation, a recovery is asked, no prior demand is necessary.

SAME.—*Township Trustee.*—*Contracts of Predecessor.*—*Presumption as to Knowledge.*—An incoming township trustee is presumed to have come into possession of knowledge of all the affairs of his school township, and he can not ignore contracts made by his township through his predecessor, upon the ground that it is defective in form.

SAME.—*Character of Contract.*—*Inquiry.*—A contract between a township, by its trustee, and a teacher, for the latter's services, although on its face the contract is by the civil township, is sufficient to put a successor of the trustee upon inquiry as to the real character in which the outgoing trustee intended to, and did, contract.

SAME.—*Trustee May Employ Teacher for Service Extending into Term of Successor.*—A township trustee may employ a teacher for a school term which will be in the official term of his successor in the trust.

SAME.— *Teacher's Contracts.*— *Limited by Available Public Funds.*— The nature of the service, and the public interests involved, require that contracts to teach public schools shall be construed to be so limited as to correspond with the public funds available.

Sparta School Township of Dearborn County *v.* Mendell.

SAME.—*Offer of Different School.—Teacher Not Bound to Accept.*—A teacher who has contracted with a township for a certain school is not bound to accept in lieu thereof an inferior school, which by reason of a lack of attendance is likely to be discontinued by the trustee at any time.

SAME.—In an action by a teacher upon a contract to teach a particular school, an answer that a different school was offered is avoided by a reply showing that another competent teacher had been previously contracted with for the offered school.

SAME.—*Construction of Contracts of Public Officers.*—The powers of a public officer to contract being prescribed by law, his contracts are presumed to have been executed in the capacity corresponding with the official duty the officer ought to perform respecting the subject-matter in hand.

From the Dearborn Circuit Court.

H. D. McMullen, *H. R. McMullen* and *W. R. Johnston*, for appellant.

G. M. Roberts and *C. W. Stapp*, for appellee.

DAILEY, J.—This action was brought by the appellee, Emma Mendell, against the appellant, to recover damages for the alleged breach of a written contract for teaching school in school district No. 1, in Sparta township, Dearborn county. The contract is dated August 2, 1890, and is signed by O. M. Loyd, then the trustee of Sparta civil township, and of Sparta school township, and by the appellee as teacher. This contract purports to be, and is, upon its face, the contract of Sparta civil township, not Sparta school township. *Jackson Tp.* v. *Home Ins. Co., etc.*, 54 Ind. 184; *McLaughlin* v. *Shelby Tp., etc.*, 52 Ind. 114. It begins: "Memorandum of agreement between O. M. Loyd, township trustee of Sparta township, Dearborn county, and State of Indiana, of the first part, etc., and is signed "O. M. Loyd, township trustee." The original complaint only sought to recover damages for the alleged violation of this contract on the part of the defendant school township, but upon demurrer to certain paragraphs of the answer, the

court carried the demurrer back to the complaint, holding it to be bad. Thereupon the plaintiff was granted leave to amend, and filed her amended complaint, by which it is sought to reform the written contract, by the correction of an alleged mistake therein, and to recover upon it, as reformed, for the alleged breach of its conditions. The appellant has assigned four errors:

1. Overruling the demurrer to the complaint.

2. Sustaining the demurrer to the second, third and sixth paragraphs of answer.

3. Overruling the demurrer to the second and third paragraphs of reply.

4. Overruling the motion for a new trial.

By section 4437, R. S. 1881, Burns' Rev. 1894, section 5913, the township trustee of a civil township in this State is *ex officio* trustee of the school township. But the civil township and the school township are separate and distinct corporations. Rev. Stat. 1881, section 4437, *supra; Carmichael* v. *Lawrence*, 47 Ind. 554; *McLaughlin* v. *Shelby Tp.*, *supra; Jackson Tp.* v. *Barnes*, 55 Ind. 136; *Greensboro Tp.* v. *Cook*, 58 Ind. 139; *Wingate* v. *Harrison School Tp.*, 59 Ind. 520; *Utica Tp.* v. *Miller*, 62 Ind. 230; *Harrison Tp.* v. *McGregor*, 67 Ind. 380.

The only power or authority of either to contract is the power conferred by statute. A school township has power to employ teachers and to make valid contracts therefor. *Jackson Tp.* v. *Barnes*, *supra; Greensboro Tp.* v. *Cook*, *supra.*

A civil township has no such power, and any such contract by a civil township is void. *Harrison Tp.* v. *McGregor*, *supra; Jackson Tp.* v. *Barnes*, *supra; Greensboro Tp.* v. *Cook*, *supra; Wingate* v. *Harrison School Tp.*, *supra; Utica Tp.* v. *Miller*, *supra; Harrison Tp.* v. *McGregor*, *supra.*

A contract executed by one described therein as "trustee" of a township named, is *prima facie* the contract of the civil township. *Jackson Tp.* v. *Home Ins. Co., etc., supra.* Such is the contract in this case. As we have seen in the body of the instrument, he is described as "township trustee of Sparta township, in Dearborn county, etc.," and it is signed "O. M. Loyd, township trustee."

The only mistake alleged is, that in the contract the words "township trustee of Sparta township" were written in the commencement of the contract, instead of the words "trustee for Sparta school township." * * * and "the signature thereto by said trustee was written O. M. Loyd, township trustee," instead of "O. M. Loyd, trustee of Sparta school township." It seems from the nature of the agreement, that the writing which was intended by the parties to evidence the contract was, in legal intendment and necessary construction, binding on the school township, yet, as it, in form, is in the name of the civil township, it was necessary, before the appellee could recover, that there should be a reformation on the ground of a mutual mistake. In view of the allegations of the amended complaint, it is an erroneous assumption to say that this action was on a written contract independent of the reformation sought and awarded. As we understand it, the appellee seeks to reform and enforce a contract actually made according to the real stipulations which passed between the two contracting parties antecedent to the execution of the writing, which by their mutual mistake, inadvertence, and oversight were defectively stated in the writing. In Am. and Eng. Ency. of Law, volume 20, p. 713, it is said: "When an agreement is made and reduced to writing, but through mistake, inadvertence, or fraud, the writing fails to express correctly the contract really made, a court of equity

will reform the instrument in conformity with the real intention of the parties." In Wald's Pollock on Contracts (ed. 1885), side page 470, note S, is the following: "Where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." In Pomeroy's Eq., volume 2, section 845, is this language:

"If, on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing." The writing is not the whole and sole agreement. The stipulations between competent contracting parties constitute the contract, while the writing is only evidence of the agreement or coming together of minds.

In Wald's Pollock, etc., *supra*, side page 5, note *d*,

we quote as follows: "It is submitted, however, as to all parol contracts of common law origin (as distinguished from specialties, and some contracts originating in the custom of merchants, which have been distinguished as 'mercantile specialties,' 2 Ames Cas. Bills and Notes, 872), that when put into writing, the writing is but evidence of the contract which in legal contemplation is made orally."

The rules with reference to mutual mistakes, reformation of contracts and showing by parol the capacity in which the parties contracted, apply between corporations and individuals as well as between natural persons. That Sparta school township has the power, under section 4437, *supra*, to enter into contracts for the employment of teachers, is a plain proposition that can not be questioned. That in making such a contract the school township, and not the trustee, is the contracting party, is not open for dispute. The allegations of the complaint show that such corporation, Sparta School Township, through its agent, the trustee, made a valid contract with the appellee to teach school. This contract, so actually and really made, was not void; not *ultra vires*, against public policy, or contaminated with any infirmity whatever, and there was, therefore, no valid reason why it should not have been evidenced by a writing in due form, so executed as to effectually state its terms. So long, therefore, as the reformation sought is no more than to make the writing state the actual contract, there is no reason why it should be exempt from the general rule.

From the averments in the amended complaint, the mistake claimed is that the common agent of the two corporation principals, by mistake of both parties, substituted in the body of the writing the wrong principal;

that is, the one which had made no contract whatever, and in like manner, by such mistake in the execution of the contract, signed himself as the agent of the wrong principal instead of the principal which had made the contract. Courts can not ignore the distinction between the actual contract and a defective and insufficient writing, which, without reformation, is no evidence of anything that was actually made or could have been made. In this case there is no effort to substitute one contracting party for another. It proceeds upon the theory that the school township was the real contracting party with the appellee, but by mutual mistake the trustee inserted the wrong description of his principal in the body of the instrument and appended the wrong designation of his office to his signature. This should be open to the same correction as any other part of the writing. It is not a case where the wrong man has affixed a signature to the contract, but how he designates in the writing and in connection with his signature his official capacity.

The appellant's counsel say: "The execution of the instrument by the trustee was the act of a public officer, and was, therefore, a mistake of law, * * * and such mistakes can not be corrected by the courts." We think the learned counsel fail to recognize the distinction between a mistake of law, as to the legal effect of a contract correctly understood by the parties, so far as its terms and stipulations are concerned, and a legal mistake made in reducing a plain and well understood stipulation to proper form. One is a mistake as to the effect, and the other is a mistake in carrying into execution that which in its oral form was well understood.

The evidence in this case clearly shows that O. M. Loyd, in making the contract with the appellee to teach school, was acting in the capacity of trustee of the school township. The paper itself furnishes abundant evidence

of the mistake of the parties, as the subject-matter in mind was the teaching of a school, and the intent was to bind the school township, which such trustee alone could do.

In *Eastman, Admr.*, v. *Provident Mut. Relief Assn.*, 65 N. H. 176, it is said: "Equity requires an amendment of the writing that will make the contract what the parties supposed it was and intended it should be, although their mistake is one of law and not of fact."

We think the allegations of the complaint are sufficient to authorize the relief prayed for. *Leedy* v. *Nash*, 67 Ind. 311; *Monroe* v. *Skelton*, 36 Ind. 302.

It was proper for the appellee to show that she appeared at the school at the time stipulated, and demanded to teach. It was her duty to be on hand ready and willing to perform the conditions of the contract as she had in fact made them. But she was not bound to demand a correction or reformation of the contract before instituting suit. Where the only relief sought is the reformation, a previous demand is essential, but where, in addition to the reformation, a recovery is asked, no prior demand is necessary. *Axtel* v. *Chase*, 83 Ind. 546 (556); *Lucas* v. *Labertue*, 88 Ind. 277; Thornton and Ballard's Ann. Pr. Code, section 279.

In the application of this principle, it makes no difference that the contract in question was repudiated by the successor of O. M. Loyd who was school trustee when it was entered into. The incoming trustee can not ignore the contracts made by his township through his predecessor, upon the technicality that it was defective in form on its face. He is presumed to have come into possession and knowledge of all the affairs of his school township, and such knowledge, once obtained, continues. Trustees may come and go, but the school township goes on forever.

The paper itself was sufficient to put him upon inquiry as to the real character in which the outgoing trustee intended to and did contract. For this reason the demurrer to the third paragraph of answer setting up want of notice was properly sustained. He could not disregard the contract on the assumption that the outgoing trustee had no right to employ a teacher for a school term which would be in the official term of his successor. It has been decided otherwise. *School Town of Milford* v. *Zeigler*, 1 Ind. App. 138.

The sixth paragraph of partial answer pleads the insufficiency of funds to carry out the contract in full, but avers that there were funds to teach sixteen weeks in the school district, and school was taught for that time. The ruling on this answer does not constitute available error, because it is defective in not showing the part of the complaint to which it is directed. The contract sued on is to be construed with reference to the funds and the time actually taught, as will be seen by examining its provisions. No more than that could be recovered under the complaint; no more was in fact obtained. The sixteen weeks set up in the partial answer would make 96 days, which, at the contract price, $1.80 per day, would be $172.80. The recovery had by the judgment was $169.20, being $3.60 less than the partial answer conceded to be recoverable. Hence the appellant was not harmed by the ruling of the court sustaining this demurrer.

The testimony of Trustee Whiteford showed that 94 days were taught in the school, which, at $1.80 per day, equals the exact amount of the judgment. The appellant was entitled to no greater reduction under the averments of the answer than the complaint itself necessarily conceded. The very nature of the service, and the public interests involved therein, require that the term of days,

weeks, or months mentioned in contracts to teach public schools should be construed to be so limited as to correspond with the public funds available.

It is next claimed that the court erred in overruling the demurrers addressed to the second and third paragraphs of reply to the fifth paragraph of answer, which, in defense to the demand for damages, alleged that the appellee was offered another school. One of these replies averred that the offer was coupled with a condition that appellant could, at its option, at any time, discontinue the proffered school for lack of school children, and upon the further condition that appellee, upon accepting the same, should release and surrender up the contract and right of action herein sued on, and waive all her rights and claims under the contract alleged in the complaint.

Appellant contends that the right to discontinue is a condition the law makes a part of every contract to teach, and that it may be exercised at any time at the discretion of the trustee, and hence the presence of such stipulation in a contract does not change its legal effect.

In our opinion this right is not an arbitrary one, and it may be abused. The presumption is that he will act judiciously and reasonably, and be controlled by the exigencies of each particular case, and that no school with an abundant attendance of children would be discontinued, while one with few children would be. This fact is what makes the value of a contract to teach that school which possesses the conditions insuring its continuance much more valuable than the contract to teach a school which affords no such assurance. Thus, the one contract is made more valuable than the other, and it can not be said that nothing is lost by the substitution of one school for another in the same township.

It will be observed that the answer to which the reply was directed, while it averred that the offered school was

as desirable and convenient, and to be of as long a term as the one mentioned in the contract sued upon, did not aver that it was possessed of those conditions as to number of children attending, which would make it of equal character in the trustee's estimation when deciding on the question of discontinuance.

The complaint avers that there was taught in the school mentioned in the contract a term of twenty-four weeks. The answer to the complaint, alleging an offer of a school which, so far as appears, was surrounded by conditions sufficient to have caused the trustee to discontinue it in a week, is not sufficient to deprive appellee of her rights under the contract upon which she seeks to recover. She was not compelled to abandon all rights under a certainty to meet the requirements of a rule that enjoins one thrown out of employment to accept other service in the same line. Such a rule is not the law and would lead to gross injustice. The condition, coupled with the offer, provided for the surrender of a valuable right. The rule requiring the acceptance of other employment, requires it to be tendered without conditions such as would be so injurious to the person as the yielding of a contract containing advantages for one with no value in it, or one stipulating for less *per diem* and liable to be put an end to at any time, as is shown by the answer. The fact that it would be taught as long as the other school appellee could not anticipate.

The third paragraph of reply averring that the trustee had already contracted in writing, with other competent teachers, to teach the offered schools, avoided the answer, because it showed that by reason of a prior contract with others the schools were already taken, and it was beyond the power of appellant to make the contract good. But, had this reply been bad, no injury resulted to appellant, because the same facts could have been proved under the

first reply, which was in general denial. The authorities all agree that contracts made by public officers or public agents, not only as to their construction, but as to the manner of signature and execution, stand upon an entirely different footing from ordinary contracts between individuals. The rights and powers of public officers to contract being prescribed by law, it is easily ascertained from the terms, purposes and subject-matter thereof, not only what the contract is, but the official capacity in which it is executed, and it is presumed to have been in that capacity corresponding with the official duty the officer ought to perform respecting the subject-matter in hand; therefore, describing himself individually in the body of the contract, or signing himself individually or with a wrong designation, is not construed as an individual contract. *Sheets* v. *Selden's Lessee*, 2 Wall. (U. S.) 177 (191); *School Town of Monticello* v. *Kendall, Admx.*, 72 Ind. 93; *Mackenzie* v. *Board, etc.*, 72 Ind. 189; *State, ex rel.*, v. *Helms*, 136 Ind. 122.

In 1 Am. and Eng Encyc. of Law, page 386, note 1, it is said: "Public agents, acting in their official capacity, may sign their own names and bind their principals."

From these authorities it seems clear that it is proper to show by parol, and from the subject-matter contracted about, the real capacity in which the public officer acted in entering into the same. Applying these principles to the case under consideration, the judgment of the court below is fully sustained on the writing and the evidence set out in the record.

A part of appellee's evidence is as follows: "It was Saturday he told me where the school was and as to pay, he said he was school trustee and was transacting school business. In signing the contract introduced in evidence, I intended to contract with the school township."

O. M. Loyd testified: "I was acting as school trustee of Sparta school township at the time I made the contract."

It would seem, from the very fact that the contract was for the employment of a teacher, that the trustee was acting as a school trustee in executing the agreement sued on, because in no other capacity could he legally and properly act while so engaged.

The judgment is affirmed.

Filed May 29, 1894.

No. 16,730.

SHIRLEY ET AL. *v.* CRABB.

EASEMENT.—*Use of Stairway.—Destruction of Building.—Extinguishment of Right.*—A reservation of such a right of way over a stairway and hall as may "be necessary to the proper use and occupancy of the upper story" of a building, does not carry an interest in the soil, and the destruction of the building by fire without the fault of the servient owner, extinguishes the right.

From the Hendricks Circuit Court.

G. W. Brill, G. C. Harvey, E. G. Hogate and *J. L. Clark*, for appellants.

C. Foley, for appellee.

HACKNEY, J.—This action was by the appellants, and its object was to quiet title to an easement.

The only question in the case arises upon an exception to one conclusion of law stated upon the facts specially found.

From the special finding it appears that in the year 1873 Homan and Piersol owned, as joint tenants, a part of lot 17, block 19, in the town of Danville, fronting

east 42½ feet on a public street, and extending west to an alley, with an additional width upon said alley. While so owning the same they erected thereon a double building, two stories high, the division wall between the two parts of said building being so constructed that the center thereof was 21½ feet south of the north line of said part lot and 21 feet north of the south line thereof. On the south side of said division wall was constructed a stairway from said street to a landing upon the second floor of said building, and another stairway from the rear of that part of the building on the south of said division line, and on the south of said division wall was so constructed as to reach said landing. From said landing was made an entrance to the second story of that part of said building on the north of said line, and through said entrance, and by said stairways was supplied the only means of ingress and egress to and from the second story of the part of said building north of said division line. By numerous conveyance, the appellees became the owner of that part of said property lying south of said division line subject to a reservation in each deed of conveyance of such a right of way over the front and rear stairways so constructed and in a hall running north and south through the second story of said building, for the proper use and occupancy of the second story of that part of said building on the north of said division line. By deeds of conveyance, the appellants became the owners of the real estate north of said division line, together with said right of way, and before and after such conveyances said stairways were continuously used openly and freely for the benefit of the appellants' part of said building until the 28th day of August, 1891, when said building and the parts thereof owned by both the parties herein, together with said stairways, were wholly destroyed by fire without the fault of either of the parties.

Since the destruction of said building, the appellee has erected upon his part of said real estate a two-story brick building, occupying the entire width of his said real estate, excepting one inch along the north line thereof, or along the said dividing line between his property and that of the appellants. On the north side of the building so constructed, the appellee has erected a stairway from said street to the second story of said building. The appellants contemplate the erection, at an early date, of a two-story building of the character of that so owned by them and so destroyed, and they desire to avail themselves of the use and privileges of stairways of the character and for the purposes of those so existing prior to the destruction of the former building. The right so desired is denied by the appellee.

Upon the facts found, the court stated as conclusions of law, *first*, that the appellants, by their purchase and the conveyance to them, acquired an easement in the nature of a right of way over said stairways and hall as they existed before the destruction of said building, and, *second*, that by the destruction of said building said easement was wholly lost and extinguished.

It is to this second conclusion that the appellants except and insist that they held an easement not to be lost by the destruction of the buildings. This position necessarily involves the claim that the appellants' rights were more than a license to use the stairways and hall, and that their interest in the property of the appellee was an easement attaching to the real estate, and continuing until extinguished by some act of the owner of the dominant estate.

The appellee contends that the conclusion of the lower court is sustained in the principle that prevails with reference to those mutual easements arising from the construction of a wall upon the dividing line between

properties and used by the owners in common for the support of their respective buildings. In such cases the rule seems to be that in the absence of express agreement there can be, by implication, no mutual easement of perpetual support applicable to future structures. *Sherred* v. *Cisco*, 4 Sandf. (N. Y. Sup.) 480; *Partridge* v. *Gilbert*, 15 N. Y. 601; *Pierce* v. *Dyer*, 109 Mass. 374; *Antomarchi's Exr.* v. *Russell*, 63 Ala. 356; *Hoffman* v. *Kuhn*, 57 Miss. 746; *Heartt* v. *Kruger*, 121 N. Y. 386.

But the right of the appellants possesses none of the elements of mutuality. It is wholly beneficial to the appellants.

The record does not contain the evidence, and we are not advised as to the exact wording of the reservations by which the alleged easement was created. We only learn from the special finding that there was reserved from the appellee "such a right of way over the front and rear stairs" and in the hall "as might be necessary to the proper use and occupancy of the upper story" of the appellants' building.

The parties, in their argument of this case, have treated this reservation as creating an easement, and have endeavored to discriminate between its effect as constituting an easement which fastens itself upon and creates an interest in the realty, and one which operates as a mere license not revocable, but extinguishable. To our minds there can be no right to be known as an easement which does not consist of an interest in real estate, and it is difficult, if not impossible, to conceive of an easement becoming extinguished, not by the act of the parties, but by the destruction of a part of the servient estate, when there is that remaining upon which the dominant estate may operate in whole or in part.

The essential qualities of easements are these:

1st. They are incorporeal.

2d. They are imposed on corporeal property.

3d. They confer no right to a participation in the profits arising from such property.

4th. They are imposed for the benefit of corporeal property.

5th. There must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. 6 Am. and Eng. Encyc. of Law, p. 142, and authorities there cited.

Possessing these elements and constituting an easement creates an interest in land. 6 Am. and Eng. Encyc. of Law, p. 143; *Robinson* v. *Thrailkill*, 110 Ind. 117; *Branson* v. *Studabaker*, 133 Ind. 147.

It is only by reason of this character of the interest that an action to quiet title to an easement is entertained under our practice. Therefore, to conclude that the appellants held no interest in the real estate is to hold that they had no easement. If the right were but a license, the fact of destruction is not essential, since the denial of the right by the appellee works a revocation, there being no such right as a license not subject to revocation and falling short of an easement.

We feel entirely certain that the reservation, in the form in which it is brought to us, was not intended to create an interest in the soil, and if it possessed the qualities of an easement, in that it became an interest in real estate, it was only to the extent of affording the use of the stairways and hall in the building as it existed, and independently of any right to or interest in the soil. If this was the extent of the interest, it follows that the destruction of the building destroyed the right as effectually as if the interest had been in the soil, and the floods had carried away the soil, nothing would remain upon which the right could operate. A new structure would not recreate the right, for such right

had been destroyed, and not simply suspended as would probably have been the case if the right had attached to the land.

The case of *Hahn* v. *Baker Lodge, etc.*, 27 Pac. Rep. 166, presents a stronger claim to a reviving right than that of the appellants. There the plaintiff owned a lot upon which was erected a two story building, the middle room or hall in the upper story of which was owned by the defendant, and used as a lodge. The building was destroyed by fire. The conveyance to the defendant contained no provision, in case of such destruction, giving the right to rebuild. No interest in the land having been conveyed, it was held that all right was extinguished. We say the claim was stronger because there the interest was an absolute ownership, here, at most, it is but an easement, and in neither case does it appear that the right extends to the subjacent soil. The distinction here marked was established by this court in the case of *Thorn* v. *Wilson*, 110 Ind. 325. It was there held that a contract under which one became the owner of an upper story of a building gave no interest in the land. It was said: "The instrument before us, however, grants a mere use, and not a proprietary interest in the *corpus* of the property, and upon such a grant a proprietary interest in the real estate itself can not be recovered." It was also suggested that in case of the destruction of the building all rights under the contract would terminate.

We conclude, therefore, that the right of the appellants did not extend beyond the use of the stairways and halls, and did not consist of an interest in the soil; that no obligation rested upon the appellee to rebuild or maintain for appellant's use another stairway in the event of the destruction of those in which the interest was held, and that by the destruction of the buildings,

without the fault of the appellee, the interest of the appellant was extinguished.

The judgment of the lower court is affirmed.

Filed April 20, 1894; petition for a rehearing overruled June 22, '94.

No. 17,209.

138 206
149 315

YOUNG, COUNTY SUPERINTENDENT, ETC., *v.* STATE, EX REL. MORGAN ET AL.

COMMON SCHOOLS.—*Township Trustee.—Enumeration Report.—When Binding on Superintendent.*—The enumeration made by a school trustee, of children who are of school age in his township, when properly and regularly reported, is binding and conclusive on the county superintendent, and he must make it the basis of his report to the State superintendent.

SAME.—*County Superintendent.—Report of.—Mandamus.—Statute Construed.—Parties Plaintiff.*—The duties required of the county superintendent by the provisions of section 4431, R. S. 1881, are ministerial only, and he may be compelled, by mandate, to perform them, and in such case the trustees are proper parties to enforce the performance.

SAME.—*Township Trustee.—Enumeration Report.—Statute Construed.*—The provisions of section 4430, R. S. 1881, in so far as they affect township trustees, are penal, and apply only where the trustee has failed to file any report, and have no application where a report in proper form, duly verified, has been filed.

From the Wells Circuit Court.

A. N. Martin and *W. H. Eichhorn*, for appellant.

J. Morris, Sr., *R. C. Bell*, *J. M. Barrett* and *S. L. Morris*, for appellees.

COFFEY, J.—Section 4472, R. S. 1881, provides that the trustees of the several townships, towns, and cities, in this State, shall, between the first of March and the first of May of each year, make an enumeration of the children, white and colored, within their respective townships, towns, and cities, between the ages of six and

twenty-one years, exclusive of married persons. It also specifically prescribes the manner in which such enumeration shall be made.

Section 4475 provides that each of such trustees shall, on or before the first day of May, annually, report to and file with the county superintendent of the proper county, a copy of his said list and enumeration, with his affidavit indorsed thereon, to the effect that the same is, to the best of his knowledge and belief, full and accurate, and that the enumeration does not include persons who are less than six nor more than twenty-one years of age.

Section 4431 requires the county superintendents of the several counties of the State, on or before the fifteenth day of May, annually to make out and forward to the State superintendent the enumeration of their respective counties, with the same particular discrimination required of the trustees in their reports to him.

Under the provisions of section 4472, *supra*, the appellees, as school trustees of the city of Ft. Wayne, made the enumeration therein required, and filed a copy of the same in proper form, duly verified, with the appellant as county superintendent of Allen county, before the first day of May, 1893. The trustees of the several townships in the county also made the enumeration required by this act, and filed duly verified copies with the appellant within the time limited.

After filing these several reports, the appellees, as such school trustees, demanded of the appellant that he make out and forward to the State superintendent the enumeration provided for by section 4431, *supra*, which he refused to do, alleging as a reason for such refusal that the enumeration made by the appellees was not correct; that it contained many more children than were entitled to school privileges in the city of Ft. Wayne, and claiming the right to employ a competent person to make a

new enumeration. Upon such refusal, this action was commenced to compel the appellant, by mandate, to perform the duty enjoined upon him by the provisions of said section 4431.

The question at issue between the parties relates to the right of the county superintendent to reject the report of enumeration made by a trustee, where he knows, or has reason to believe, that such report is incorrect, and employ some competent person to make another enumeration. It is contended by the appellant that he has such right and power, while on the other hand it is contended by the appellees that the report of the trustee, in due form, properly verified, is binding on the superintendent, and that he must accept the same, and make it the basis of his report to the State superintendent.

In arriving at a just conclusion upon the question here presented, it must be borne in mind that a county superintendent is a statutory officer belonging to the administrative department of the government, without judicial power. His duties are generally ministerial. *Elmore* v. *Overton*, 104 Ind. 548.

Officers of this class, as a rule, possess no powers except such as are conferred upon them by statute, either expressly or by necessary implication. If, therefore, the appellant possessed the power to reject the enumeration made by the appellees, and employ some competent person to make another, it must be that he possessed it by reason of some statutory provision. It is claimed by him that he had such power by reason of the provisions of section 4430, R. S. 1881, which provides that when any trustee shall neglect to file with the county superintendent an enumeration of the children of the township, town or city, as required by section 4472, *supra*, the county superintendent shall, immediately after the first day of May in each year, employ a competent person to take

the same, and allow a reasonable compensation for such services, payable from the school revenue of the township, and shall proceed to recover the same in the name of the State of Indiana for the use of said revenue of said township by action against the trustee in his individual capacity.

We are of the opinion that this section does not confer the power claimed. In so far as it affects the trustee, it is penal in its character, and must be strictly construed. In its terms, it applies to a case where the trustee has failed to file any report, and has no application to a case where a report in proper form, duly verified, has been filed.

By the above provisions of our statute, the trustee is made the proper officer to take the enumeration of the school children, and where he performs that duty and files the required report, there is no provision for making another enumeration. The enumeration made by him, when properly and regularly reported, is, we think, binding and conclusive on the county superintendent.

The duty required of the county superintendent by the provisions of section 4431, *supra*, are, in our opinion, ministerial only, and he may be compelled, by mandate, to perform them.

It is further claimed by the appellant, that the appellees, as trustees of the school board, can not maintain this action, and that the suit should have been brought on the relation of the school board of the city of Fort Wayne.

In this contention, we think the appellant is in error. This is not an action to enforce a liability on a contract in favor of the school board, but is a proceeding by officers charged with the performance of specific duties, to compel another officer to discharge a duty due from him.

In such case, the officers charged with the performance of a specified duty are the proper relators. *Cole* v. *State, ex rel.*, 131 Ind. 591.

There is no error in the record for which the judgment of the circuit court should be reversed, and the same is, therefore, affirmed.

DAILEY, J., took no part in the decision of this cause.

Filed June 21, 1894.

No. 16,830.

SHIRK *v.* NORTH.

MARRIED WOMAN.—*Promissory Note.—Indorsement.—Suretyship.—Estoppel.—Innocent Purchaser.*—Where a wife, being the owner of a promissory note, indorses the same in blank, without restriction, and delivers the possession thereof to a creditor of her husband as collateral security for the latter's debt, and such creditor sells and assigns the note to an innocent purchaser for value, the latter acquires title, the wife being estopped to assert that her assignment was different from what it appears to be.

From the Howard Circuit Court.

J. Mitchell, *M. Bell* and *W. C. Purdum*, for appellant.

J. W. Cooper, for appellee.

DAILEY, J.—This was an action brought by the appellee Susannah North, against Ananias D. Hensler, Mary Hensler, the First National Bank of Peru, Indiana, Richard A. Edwards, and Milton Shirk, to foreclose a mortgage on certain real estate in Howard county, in the State of Indiana, against Ananias D. Hensler for the amount due on two notes of two hundred dollars each, and to recover said notes, which she averred were in the

possession of the defendant, the First National Bank of Peru, or the defendant Richard A. Edwards, or the defendant Milton Shirk. The following is a history of the cause as made by the pleadings: The complaint is in one paragraph, and alleges that on April 14, 1890, Ananias D. Hensler, a defendant below, executed to the plaintiff, Susannah North, eight promissory notes, the first seven calling for two hundred dollars each, and the last note for two hundred and fifty-two and $\frac{60}{100}$ dollars, due respectively March 15th of each year, beginning on March 15, 1891, and ending on March 15, 1898. That these notes provide for six per cent. interest per annum; that all of said notes are payable with attorney's fees, and were given as the purchase price for the interest of the plaintiff in certain real estate inherited from her father, situate in Howard county, Indiana, a description of which is set out in the complaint. That the first two notes are due and unpaid. That on the same day, said Ananias D. Hensler and Mary Hensler, his wife, to secure the payment of said notes, executed and delivered to the plaintiff a mortgage on said real estate, copies of which notes and mortgage are set out as exhibits to the complaint. It further avers that at the time of making said notes, and ever since, the plaintiff was a married woman, the wife of Gary W. North. That on the 22d day of April, 1890, after the execution of the notes to her as aforesaid, her said husband executed to one Abraham S. Yoder two notes of two hundred dollars each for an interest in a patent right known as "Kentucky Single Tree" for territory in certain counties in said State. That through the importunities and persuasions of her husband and said Yoder, she made a pretended assignment of two of said notes, being the notes falling due March 15, 1891, and March 15, 1892, for two hundred dollars each, to said Abraham S. Yoder as collateral security

for the payment of the notes given by her husband to said Yoder. The complaint further avers that in April, 1890, said Yoder assigned the notes executed by said Hensler to the plaintiff, which had been assigned to him as such collateral security to either the defendant, the First National Bank of Peru, Indiana, Richard A. Edwards, or Milton Shirk, and one or the other of them has the possession thereof, but she does not know which. The complaint further avers that the pretended assignment of said notes to said Yoder by the plaintiff, as collateral security for the debt of her husband, is void, and the same did not pass any title to said Yoder, nor did his assignment pass any title to the assignee. Prayer that the assignment be declared void, that said notes be adjudged the property of the plaintiff, that she have judgment thereon against said Ananias D. Hensler for two hundred and fifty dollars, the foreclosure of the mortgage against all the defendants, and other proper relief.

The defendants, the First National Bank of Peru, Indiana, Edwards, and Shirk each filed separate demurrers to the complaint, which demurrers were severally overruled, and each excepted thereto. The last three named defendants filed their joint answer in denial. Thereupon the defendants, the First National Bank of Peru, Indiana, and Edwards, each filed a separate answer in disclaimer. The defendant Shirk filed his separate answer in one paragraph, to which a demurrer was sustained by the court. By leave of court, the defendant Shirk then filed his amended answer, with exhibits, to the complaint, substantially as follows: That the defendant has been a resident of Peru, Miami county, Indiana, for over thirty years; that he is president of the First National Bank of said city, and is a broker who purchases notes from time to time, of persons who offer them for sale at his office; that in April, 1890,

the plaintiff, Susannah North, assigned the notes sued on to one Abraham S. Yoder, by writing her name on the back thereof, and delivering them to him; that in said month said Yoder came to his office and offered said notes for sale, and said he was the owner thereof; that said defendant finding said notes in his possession, and properly assigned by the plaintiff, Susannah North, by written indorsement of her name in blank, purchased them of said Yoder for a valuable consideration before maturity, and said Yoder assigned and transferred said notes to said defendant by written indorsement thereof, and delivered them to him.

The answer contains a copy of the notes and indorsements thereon.

It further avers that the defendant, at the time he purchased said notes of said Yoder and paid him therefor, had no knowledge whatever that said notes had been obtained by said Yoder from said North or her husband as collateral security for the debt of her said husband, or that he obtained them in any other way than by a straight purchase from Susannah North, or that she claimed any ownership therein; that at the time of the purchase he believed said Yoder to be the *bona fide* owner of the notes, and, in the purchase, he relied exclusively on the assignments thereon made by the plaintiff, and the possession thereof by said Abraham S. Yoder. Wherefore he says the plaintiff ought not to maintain her action against him.

The first and second errors assigned test the sufficiency of the complaint as against the appellant, and the third tests the sufficiency of appellant's amended answer.

As these alleged errors involve the same question, they may very properly be considered together, and as the demurrer to the amended answer will reach back to the complaint, we will examine its averments.

Section 5501, R. S. 1881, being section 7515, Burns' Rev. 1894, provides that "All promissory notes, bills of exchange, bonds, or other instruments in writing, signed by any person who promises to pay money, * * * shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively."

The section following authorizes the assignee of any such instrument, so indorsed, to recover in his own name from the person who made the same.

"The effect of these provisions is to vest in the indorsees of the instruments named therein, whether such instruments be technically negotiable by the law merchant or not, a complete legal title, as well as a right of recovery by indorsees in their own names, respectively. Whatever right remains in the assignor of an instrument thus assignable, after the holder has transferred it by an unrestricted indorsement, must of necessity be of a purely equitable character." *Moore* v. *Moore*, 112 Ind. 149 (152).

The answer raises the question of the effect of the assignment of said notes, and the subsequent purchase of them by the appellant, who maintains that he acquired a good title to these notes for the following reasons: The appellee assigned said notes to A. S. Yoder by the written indorsement of her name on the back thereof in blank, and without any restrictive written conditions on the notes. She also delivered the possession of them to Yoder, and thus, by her own acts, clothed him with the highest *indicia* of title, viz., assignment and possession, and when he brought the notes to the appellant and offered them for sale, he had the most indisputable title that can accompany personal property, viz., the legal title by indorsement and possession.

1 Wait's Actions and Def., 598, and cases cited, recognizes the doctrine that where actual delivery accom-

panies the indorsement or transfer of a bill or note, there is an important legal presumption in favor of the holder or possessor of negotiable paper, * * * that he is a *bona fide* purchaser for value, before the bill or note came due.

It appears that the appellant purchased the notes in suit in the ordinary course of business, and he looked to the evidences of title in making the investment. There is no denial in the complaint, that the appellee made the assignment and delivered the notes to Yoder. The appellant paid a valuable consideration for them, relying upon the fact that they were properly assigned and were in Yoder's possession.

It is a familiar rule of law that where one of two equally innocent parties must suffer, the one who has put it within the power of another to impose on an innocent person must be the one to bear the loss. *Stoner* v. *Brown*, 18 Ind. 464; *Moore* v. *Moore*, *supra*.

In this case the appellee, by her indorsement of the notes in blank, without any restrictive conditions written thereon, and the delivery thereof to Yoder, placed it in his power to impose on the appellant. The appellee could have protected herself by making a restrictive written indorsement on the notes, stating that they had been assigned as collateral security for the debt of her husband. This would have precluded the person in whose favor it was made from making such a transfer as would create a right of action against either the party making the indorsement or any of the antecedent parties. 1 Wait's Actions and Def., 597.

By so doing, she would have put every person to whom Yoder attempted to sell the notes, on his guard, and prevented him from being imposed upon. She did not choose to do this, and, as between her and the appellant, she must be the one to suffer from her negligence. As

against the careless assignor, the law favors the diligent, good faith assignee, who is a holder of indorsed paper for a valuable consideration, although it may not be governed by the law merchant. The appellee having indorsed the notes in blank and delivered them to Yoder, the force and effect of these acts were to vest a good title in such innocent purchaser for value. The indorsement in blank was regular, and could not be changed by parol evidence so as to show a different state of facts from what the blank indorsement presented. 1 Wait's Actions Def., 596, and cases cited; *Houck* v. *Graham*, 106 Ind. 195 (198); *Moore* v. *Moore*, *supra*.

It is also contended by the appellant's counsel, that the appellee is estopped by her own acts from asserting a claim to the notes in controversy. Section 5117, R. S. 1881, being section 6962, Burns' Rev. 1894, contains this proviso: That a married woman shall be bound by an estoppel *in pais*, like any other person. Applying this principle to the case at bar, it would seem the point is well taken. If these notes had been owned by the husband of the appellee, and he had assigned them in blank and delivered them to Yoder it could scarcely be assumed by counsel for the appellee, that he would not be estopped from claiming or asserting an ownership in the notes. If, then, a married woman is to be estopped, like any other person, the appellee would be bound by her acts in this cause and estopped from claiming these notes against the appellant.

In *Cupp* v. *Campbell*, 103 Ind. 213, on page 220, cited by counsel on both sides, the court clearly lays down the doctrine of estoppel, as applied to married woman, as follows: "While it is true that a married woman is now subject to an estoppel *in pais*, like any other person, she is not to be estopped in any manner different from any other person. Some element of fraud, misrepresentation

or concealment must enter into her conduct, so that the estoppel shall be predicated upon tort, and not upon contract. A married woman has no more right to injure or mislead others by her conduct or representations than if she were *sui juris*, and where it is made to appear that by fraud, misrepresentation or concealment, she has led one into contracting with her as principal, she will not be permitted to gainsay such representations as may have induced another to act who in good faith relied on them."

It will thus be seen that a married woman may be precluded from asserting a fact by previous concealment inconsistent therewith on her part, as well as by fraud or misrepresentation; she may utter no words, make no misrepresentations in language, but if, as stated, she conceals the facts, or misrepresents them by concealment, she is a wrongdoer, and is to be estopped like any other person.

Appellee avers in her complaint, that she assigned the notes in suit as collateral security for the debt of her husband, but she indorsed them in blank and delivered them to him. She concealed the facts by her indorsement in blank without restrictive conditions that she had transferred them to him as collateral security for the husband's debt. By her unlimited indorsement of these notes, and their delivery to Yoder, she misrepresented the facts, and put it in the power of Yoder to dispose of them to an innocent person. She clothed Yoder with the highest *indicia* of ownership of personal property, and sent forth no words of warning by which innocent and unsuspecting persons could be put on their guard. The appellant, in his answer, says he expressly relied upon appellee's indorsement and the possession of the notes by Yoder. It is clear that the appellee has, by her

own conduct, brought herself within the rule declared in *Cupp* v. *Campbell*, *supra*, and she is now estopped, by her own acts, from claiming the notes in controversy against the appellant. *Ward* v. *Berkshire Life Ins. Co.*, 108 Ind. 301; *Rogers* v. *Union Central Life Ins. Co.*, 111 Ind. 343; *Lane* v. *Schlemmer*, 114 Ind. 296; *Long* v. *Crosson*, 119 Ind. 3.

In *Moore* v. *Moore*, *supra*, pp. 152, 153, the doctrine here laid down is expressed as follows: "The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute." Numerous authorities are cited in support of this proposition.

Pomeroy's Remedies and Remedial Rights, paragraph 161, is as follows: "In short, whenever the owner of a non-negotiable thing in action delivers the same to another person, and accompanies the delivery by an assignment thereof, absolute on its face, and this person transfers the same to a purchaser for value who relies upon the apparent ownership created by the written assignment, and has no notice of anything limiting that apparent title, the original owner is estopped from asserting as against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security, * notwithstanding the written transfer." For these reasons, in our opinion, the court erred in overruling the demurrer to the complaint and in sustaining the demurrer to the amended answer of the appellant.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the complaint.

Filed May 29, 1894.

16,399.

COPELAND, EXECUTOR, ET AL. *v.* SUMMERS ET AL.

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159 610
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169 642
170 507

PARTY IN INTEREST.—*Right to Sue.—Contract.—Delivery.*—A person for whose benefit a contract has been made may bring suit on the same, and it is not necessary that the contract should ever have been delivered to him.

CONTRACT.—*For Benefit of Minor.—Acceptance.*—Where a party for whose benefit a contract has been made is a minor, it is not necessary that he should accept the same, as the law puts in an acceptance for him.

SAME.—*For Benefit of Another.—Acceptance.*—If a person in whose favor a contract has been made was at the time an adult, the subsequent bringing of an action based on the contract is a sufficient acceptance of the same.

SAME.—*Construction with Will and Deed.—Title.—Testamentary Disposition.*—From the fact that a deed, a contract, and will should all be construed together, for the purpose of ascertaining the intention of the parties, it does not necessarily follow that all such instruments executed at that time are to be regarded as a testamentary disposition of the property named therein, and that title to the property named in the deed did not pass to the grantee.

TRUST.—*Conveyance.—Real Estate.—Contract.*—Where A conveyed to B certain land, and took from B an obligation to pay to C *et al.* certain sums named therein, B was thereby made a trustee for C *et al.*

SAME.—*When can not be Altered.*—And the trust being once created and accepted, it can not be altered, either by the donor or trustee, without the consent of the beneficiary.

SAME.—*Title.—Grantor and Grantee.*—In such case, on the delivery of the obligation, the title vested in the grantee.

PLEADING.—*Theory of.*—A pleading must proceed upon a definite theory, and if bad upon that theory it can not be sustained upon some other.

TENDER.—*When Available as a Defense.*—To make a tender of any

avail, it is generally necessary to keep it alive for the use of the party to whom it is made.

Opinion on petition for rehearing by COFFEY, J.

From the Shelby Circuit Court.

E. K. Adams, *J. T. Carter*, *K. M. Hord* and *T. B. Adams*, for appellants.

B. F. Love, *H. C. Morrison*, *O. J. Glessner* and *L. F. Wilson*, for appellees.

COFFEY, J.—On the 4th day of October, 1880, Milton L. Copeland, Sr., executed to Milton L. Copeland, Jr., his son, a warranty deed to one hundred and sixty acres of land in Shelby county, Indiana. At the time of executing the deed the grantor took from the grantee a written contract, by the terms of which it was stipulated that the grantee, in consideration of the conveyance, should pay the grantor the sum of one hundred and twelve dollars and fifty cents on the 1st day of August of each year, and a like sum on the 25th day of December of each year during the life of the grantor. The contract also gave to the grantor the right to take fire wood from the land, and the privilege of taking such fruit as he might need for his own use.

After these provisions and stipulations, the contract proceeds as follows: "And the said Milton L. Copeland, Jr., further agrees to pay George M. Smith, at the death of the said Milton L. Copeland, Sr., the sum of $1,000. Said sum to draw interest at the rate of six per cent. per annum after the death of said Milton L. Copeland, Sr., until paid, and the further sum of $1,000 to George T. Summers, payable at the decease of said Milton L. Copeland, Sr., and to draw interest as in the case of George M. Smith last above mentioned, and the further sum of $500 upon the death of said Milton L. Copeland, Sr., to Eliza C. Summers, if she be then living, and if

dead to her children, except George T. Summers, said sum to draw interest at the rate, and in the manner as set out above, and for the purpose of securing the payment of the several amounts above set out to the persons to whom said amounts are payable. Said Milton L. Copeland, Jr., hereby mortgages and warrants, and creates a charge upon all the above and foregoing described real estate."

At the time of executing this deed and contract, Milton L. Copeland also executed his will. By the first clause of the will he devises to George M. Smith, who is his grandson, certain described land in Howard county, Indiana, after which the will contains the following: "I also devise and bequeath the sum of $1,000 to said grandson to be paid to by my son Milton L. Copeland, Jr., or from said son collected by my executor and paid to him."

By the second clause of the will, he bequeaths to his grandson George T. Summers, the sum of $1,000 when he arrives at the age of twenty-one years, payable by his son Milton L. Copeland, Jr., or from him collected by the executor and paid over. By the third clause he gives to Eliza C. Summers the sum of $500, payable by his son Milton L. Copeland, Jr. The fifth clause of the will is as follows: "I make no provision for my son Milton L. Copeland, Jr., herein, and desire that he shall take no part of my estate, by reason of a deed and advancement to him this day made of 160 acres of land in Shelby county, Indiana, known as my home farm. Such an advancement being of a greater value than an equal interest in my estate with my other children, and said son does this day execute to me his obligation, among other things providing that the sums as bequeathed in sections 1, 2, 3, shall be by him paid as herein provided as the consideration for said above mentioned excess,

said sums to be so paid have been made a charge upon said land."

The contract above referred to was delivered to Milton L. Copeland, Sr., at the time of its execution, but was never delivered to either George M. Smith, George T. Summers or Eliza C. Summers. George T. Summers at its date was a minor.

Upon the death of Milton L. Copeland, Sr., the appellees Eliza C. Summers and George T. Summers, assuming that they had a right to recover on the contract involved in this suit, as upon a contract made for their benefit, instituted suit in the Shelby circuit thereon against Milton L. Copeland, Jr., and others who were alleged to claim an interest in the contract, for that purpose.

Milton L. Copeland, Jr., appeared to the action, confessed the indebtedness, alleged that there were conflicting claims to the funds, and asked that the parties asserting claims might be required to interplead. He paid the money due into court, and thereupon an order was entered requiring the parties claiming the money to interplead, and he was discharged.

He being executor of the will of Milton L. Copeland, Sr., was made a party to the action as such, and by proper pleading asserted a claim to the money on the ground that it belonged to the estate represented by him, and was necessary to pay the debts due from such estate. The pleadings in the cause, after the order to interplead, were so framed as to present the question as to whether this fund belongs to the estate of Milton L. Copeland, deceased, or whether it is the property of the appellees, Eliza C. Summers and George T. Summers.

It is contended by the appellants, as we understand their briefs filed in the case, that inasmuch as the deed, contract, and will, above referred to, were all executed at

the same time, and because the deed and contract are referred to in the will, the transaction is to be regarded as a testamentary disposition of the property of Milton L. Copeland, Sr., and that the title and control did not pass from him prior to his death, and, therefore, it belongs to his estate subject to be used in the payment of debts and the expenses of settling the estate.

On the other hand, it is contended by the appellees that the title and control of the property mentioned in the contract passed from Milton L. Copeland, Sr., upon delivery of the contract to him, and vested in George T. Summers and Eliza C. Summers.

The rule that one for whose benefit a promise has been made to a third party may maintain an action in this State, in his own name, on such promise, is too familiar to require the citation of authority. In order to enable the appellees to maintain this action, it was not necessary that the contract should have been delivered to either of them. It contained a promise to pay Milton L. Copeland, Sr., certain sums of money, and delivery to him was sufficient. *Henry, Assignee*, v. *Anderson*, 77 Ind. 361; *West* v. *Cavins, Exr.*, 74 Ind. 265; *Waltz* v. *Waltz*, 84 Ind. 403.

Nor was it necessary that George T. Summers should have accepted the provision made for him. As he was a minor, and the provision was for his benefit, the law put in an acceptance for him. *Nolte* v. *Libbert*, 34 Ind. 163; *Guard* v. *Bradley*, 7 Ind. 600; *Pruitt* v. *Pruitt*, 91 Ind. 595.

The institution of this suit is a sufficient acceptance on the part of Eliza C. Summers.

We agree with counsel for the appellants, that we should consider the deed, contract, and will as constituting one transaction, for the purpose of ascertaining the intention of the parties; but we can not give our as-

sent to the proposition that because they are to be so considered, all the instruments executed at that time are to be regarded as a testamentary disposition of the property named therein, and that the title did not pass from Milton L. Copeland, Sr.

The deed from him to Milton L. Copeland, Jr., certainly vested in the latter the title to the land therein described. He could do nothing to divest such title without the consent of the owner.

By the conveyance to Milton L. Copeland, Jr., and taking back from him an obligation to pay the appellees the sums therein named, he made him a trustee for the appellees. In contemplation of law, he left in the hands of Milton L. Copeland, Jr., the amount of money to be paid to them, and thereafter he held such funds as their trustee, to be paid according to the terms of the contract. *Coppage, Admr.*, v. *Gregg*, 127 Ind. 359.

The rule is elementary that a trust once created and accepted can not be altered or changed, either by the donor or trustee, without the consent of the beneficiary. If executed, it can not be revoked without the consent of the *cestui que trust*.

In the case of *Haxton* v. *McClaren*, 132 Ind. 235, it was said by this court: "If the trust is perfectly created, the donor or seller having nothing more to do, the person seeking to enforce it having need of no further action on the part of the donor, nothing being required of the court but to give effect to the trust, it will be carried into effect at the suit of a party interested although it was without consideration."

In this case, Milton L. Copeland, Sr., conveyed certain lands to his son, leaving in his hands for the use of the appellees the money for which they sued, part of the purchase-price to be paid to them at his death. As to George T. Summers, at least, the law put in an accept-

ance, and for that reason, as to him, the trust could not be revoked, altered, or changed without his consent.

As to Milton L. Copeland, Sr., the trust was perfectly created. There was nothing more for him to do. The appellees require no further action on his part. Nothing is required of the court, except to give the trust effect. Under these facts, we think the title of the donor to this fund was divested at the time the contract was executed, and vested in the appellees, unless there is something in the will which would prevent such a result.

We think a careful reading of the will fails to disclose any intention on the part of the testator to prevent the deed and contract in controversy from having the effect the law would give them in the absence of a will. Indeed, the will seems to emphasize the intention of the testator to vest the fund now in suit in the appellees, for it seems to have been his intention to put the objects of his bounty upon an equality. This he could not do if he vested in his son the absolute title to the land and left the fund set apart to these appellees, subject to the payment of his debts and the expenses of settling his estate.

There is no question in the case as to whether the transfer of the land or this fund was fraudulent as to creditors. The executor bases his claim to the fund upon the ground that the title did not vest in the appellees, and that for that reason, upon the death of Milton L. Copeland, Sr., it belonged to his estate.

We think that the title to this fund vested in the appellees, upon the delivery of the contract above mentioned to Milton L. Copeland, Sr.

This conclusion accords with the ruling of the circuit court.

Judgment affirmed.

HACKNEY, J., took no part in the decision of this cause.

Fled Nov. 27, 1893.

ON PETITION FOR A REHEARING.

COFFEY, J.—A petition for a rehearing is filed in this case, supported by an earnest and able brief, in which it is contended that this court erred in holding there was no question of fraudulent conveyance involved.

After another careful examination of the pleadings, we still entertain the belief upon this subject expressed in the opinion heretofore handed down. It is true that in the *first* paragraph of the answer of Milton L. Copeland, as executor, it is shown that the testator, after the execution of the contracts in suit, did not have sufficient property left to pay his debts, and that such debts still remained unpaid, but the answer proceeds upon the distinct and definite theory that such contracts and the will of the testator constituted a testamentary disposition of the property named in the contracts, and that the title to such property did not, therefore, vest in the appellees until the death of the testator, and was, for that reason, part of the assets in the hands of the executor, subject to be used in the payment of such debts. In holding that the title to the property mentioned in the contracts vested in those for whose benefit the contracts were made, at the time of their execution, we necessarily held that this answer was bad upon the theory upon which it proceeds. It is well settled that every pleading must proceed upon some single, definite theory, and if bad upon the theory on which it proceeds, it can not be sustained upon some other theory. *Platter* v. *City of Seymour*, 86 Ind. 323; *Mescall* v. *Tully*, 91 Ind. 96; *Western Union Tel. Co.* v. *Young*, 93 Ind. 118; *Chicago, etc., R.*

R. Co. v. *Bills*, 104 Ind. 13; *First Nat'l Bank, etc.*, v. *Root*, 107 Ind. 224; *Pearson* v. *Pearson*, 125 Ind. 341.

As there is no pleading in the record, drawn upon the theory that the property sought to be recovered by the appellees was transferred to them in fraud of the rights of creditors, there is no question of this character involved in the case.

It is also claimed by the appellant Milton L. Copeland, as executor, that this court erred in failing to pass upon the sufficiency of the second paragraph of his answer as an estoppel.

This paragraph avers, substantially, that the appellee Eliza C. Summers, at the death of Milton L. Copeland, Sr., had full knowledge of the contract upon which she sues, and her rights thereunder; that Milton L. Copeland, Jr., the maker of said contract, on the 10th day of February, 1886, tendered to her the full amount due under such contract, and that she, with such knowledge, refused to accept the same, and repudiated the contract, and so continued to refuse the same up to the time of the commencement of this suit; and that the assets of the estate of the said Milton L. Copeland, Sr., are not sufficient to pay the debts and expenses of administration.

We are unable to perceive any element of estoppel in this answer. To make a tender of any avail whatever, it is generally necessary to keep the thing tendered for the use of the party to whom the tender is made. It certainly is not the law that money tendered to a creditor, if refused, becomes the property of the debtor, and that he may keep it and refuse to pay the debt.

The court did not err in sustaining a demurrer to this answer.

The petition for a rehearing in this case is overruled.

Filed June 19, 1894.

No. 16,828.

TONEY *v.* WENDLING ET AL.

TRUST.—*Husband and Wife.—Personal Property.*—A husband who receives from his wife a deposit of money belonging to her separate estate, and uses it for his own purposes, becomes charged as trustee of the money, and his heirs are liable to account to the wife.

SAME.—*Resulting Trust in Land.—When it Does Not Arise.*—To create a resulting trust in land, under the second clause of section 2976, R. S. 1881, in favor of a wife by reason of the use by the husband, in part payment for the land, of money held by him as her trustee, it must appear that the money was delivered by the wife prior to the purchase, and under a contract by the husband to return the identical money when requested.

From the Cass Circuit Court.

R. Magee and *G. W. Funk*, for appellant.

M. B. Lairy and *D. D. Fickle*, for appellees.

DAILEY, J.—The appellee Lennie C. Wendling filed her complaint in the court below, for partition of certain real estate, making defendants therein the appellant, Caroline Toney, and the appellees Milford Toney, Harry Toney, Albert Toney, and Ulysses Toney.

On the 9th day of November, 1892, the appellant filed her cross-complaint in the said action, making defendants therein the appellees, all of whom were minors, with the exception of Lennie C. Wendling. The court appointed David D. Fickle, Esq., an attorney at law of the Cass Circuit Court, as their guardian *ad litem*, who accepted the appointment and qualified according to law. The appellee Wendling filed a separate demurrer to each paragraph of the appellant's cross-complaint, and the guardian *ad litem* filed a separate demurrer for the minors to each paragraph thereof. The demurrers alleged, as a cause, that neither paragraph of the cross-complaint stated facts sufficient to constitute a cause of action. The

appellant has assigned as error the sustaining of the demurrer to each of said paragraphs, yet she declines to argue the ruling upon the first paragraph, and, under the rules of practice of this court, it is waived.

In the second paragraph of her cross-complaint, appellant alleges, in substance, that she and the appellees were the owners in fee-simple, as tenants in common, of certain real estate described therein, and that they derived title to said real estate by inheritance from Samuel S. Toney, deceased, who was the father of the appellees and the husband of the appellant, and that in the year 1868, when appellant and Samuel S. Toney were married, the appellant became possessed, in her own right, of a separate estate in the sum of five hundred dollars in money, derived from the estate of her deceased father, and, at the request of her husband, Samuel S. Toney, appellant deposited with him the said sum of five hundred dollars, to be kept by him for appellant; that after her husband had received said sum of money into his custody, he took the same and used it in paying a part of the purchase-money in order to enable him to acquire title and ownership in and to the real estate described in her cross-complaint; that said sum of money was never repaid to appellant, and her husband died intestate in the year 1891, leaving surviving him as his only heirs at law the appellant and the appellees herein, and she asks, in her cross-complaint, to have a lien declared upon the lands to be partitioned, for the said sum of money, with interest, and alleges that the personal estate of the decedent is insufficient to pay such demand. She also alleges that, in addition to said lien, she is the owner in fee-simple of the undivided one-third of the real estate described therein, and that the appellees each own the undivided two-fifteenths of said land, subject to the lien and interest of the appellant, as aforesaid. The appel-

lant prays for the partition of said real estate, as well as that such lien be declared in her favor for the amount of money belonging to her, which her husband invested in said lands.

This paragraph of the cross-complaint is drawn upon the theory that, by reason of the acts and dealings of the appellant and her deceased husband, Samuel S. Toney, a trust resulted in her favor in a part of the lands of which he died seized, and, by reason of this fact, she is entitled to have a lien declared upon the lands in her favor, to the extent of the amount of money she deposited with the husband, which he used in its purchase, with interest thereon.

Under the common law rule, the wife's personal estate once reduced to the possession of the husband became his, and no trust could result from its investment in land. *Ream* v. *Karnes*, 90 Ind. 167 (172), and cases cited.

But it is now the established law of this State that "The personal property of the wife held by her at the time of her marriage, or acquired, during coverture, by descent, devise, or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains," etc. R. S. 1881, section 2488; Burns' Rev. 1894, section 2649.

In *Armacost, Admr.*, v. *Lindley, Admr.*, 116 Ind. 295, this court held that where a husband, at his own suggestion or request, obtained the title or possession of his wife's separate property, which, the statute declares, shall remain her own, even though the possession be obtained with her consent, unless the facts and circumstances show an agreement, or intention on the part of the wife that her husband shall receive it as a gift, the law will presume that he took it as her agent or trustee.

In this case, under the allegations of the cross-complaint, showing that the wife at one time had dominion

over this money as her patrimony, but, at the request of the husband, deposited the same with him to be kept for her, and that he used it in paying a part of the purchase-money of the real estate in controversy, it is the appellant's contention that in the possession and management thereof, equity will hold the husband and his heirs trustees of such property, and upon the death of the husband the heirs are liable to account; also, that in partition proceedings among the heirs the money so loaned or deposited may be taken into consideration the same as in case of advancements, and equity will create a lien for the purpose of enabling the owner of a fund to pursue the particular thing and operate upon it in such a way as to afford adequate and specific relief; that under the doctrine of equitable liens the appellant's proper remedy to pursue is to have a lien declared upon these lands to the extent of the money so used by the husband.

In our opinion there can be no question but that in this case, under the facts stated in the cross-complaint, and in the light of the decisions of this and other courts, the appellant's husband, when he received her patrimonial estate from her, became charged as trustee of the money, and his heirs are liable to account, and such facts are sufficient to justify a judgment against his estate; but does it follow that the allegations are sufficient to show a resulting trust in the land in favor of the appellant? An implied trust is a mere creature of equity, founded upon presumptive intention and designed to carry that intention into effect—not to defeat it. If it is not the intention that the estate shall vest in him who pays the purchase-price, then no resulting trust in his favor attaches to the property. The trust can only arise from the original transaction at the time it takes place, and at no other time. The funds must be advanced and invested at the time the purchase is made. A resulting trust can

not be created by funds subsequently furnished. It is not possible to raise such a trust by the subsequent application of the money of a third person in satisfaction of the unpaid purchase-money. It has been many times held that "the resulting trust must arise, if at all, at the time of the execution of the conveyance." 2 Ballard's Annual, etc., section 625, and cases there cited; 1 Ballard's Annual, etc., section 387.

The law concerning resulting trusts in this State is fixed and controlled by statute. Section 2974, R. S. 1881 (Burns' Rev. 1894, section 3396), reads: "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." The section following contains provisions concerning the rights of creditors.

Section 2976, R. S. 1881 (Burns' Rev. 1894, section 3398), is as follows: "The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in violation of some trust, shall have purchased the land with moneys not his own; or where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein, in trust for the party paying the purchase-money or some part thereof."

Under these sections a resulting trust will arise in three different classes of cases: *First*, where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid. *Second*, where such

alienee, in violation of some trust, shall have purchased the land with money not his own. *Third*, where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase-money or some part thereof.

In the case at bar it is not assumed that the cross-complaint contains any averment that brings the appellant's claim within the terms of the first class specified in section 2976, *supra*, for it nowhere appears that the decedent took such conveyance in his own name without the consent of the wife from whom he received the the money, and we may indulge the presumption that the transaction was with her concurrence and approval. There is no claim or pretense that a resulting trust can be declared in favor of the wife, in the lands purchased by the husband, by reason of anything contained in the third class of cases, for it is not shown that by agreement, and without any fraudulent intent, the husband who received the conveyance, was to hold the land or any interest therein in trust for the wife, who alleges she paid a part of the purchase-money. But the appellant contends that her case is exactly in point under the second clause of the section which provides that if the alienee, in violation of some trust, purchases land with money not his own, and takes the title in his own name, a trust will arise in favor of the party paying the purchase-money or some part thereof. Under this clause, it is perfectly clear that if the alienee purchased the land with moneys not his own, this fact alone could create no resulting, presumptive or implied trust in favor of the person with whose money the consideration was paid. The provisions of this clause only extend to cases where the purchase shall have been made in violation of

some trust, because it so declares in express terms. In the ordinary cases of deposits of money, the transaction amounts to a mere loan or *mutuum*, or irregular deposit, and the borrower, or bailee, is required to restore an equivalent sum whenever demanded. If, in the case at bar, the purchaser's obligation was not to return the identical money placed in his hands, but other funds of equal value, it could be no violation of his trust to apply what he received for her in payment on the lands in controversy, and a trust would not result by operation of law, which would attach on the lands bought by him. If there were facts averred in the cross-complaint showing that at the time the husband bought this real estate, he paid for it in whole or in part with money belonging to the separate estate of his wife, without her knowledge or consent, or under an agreement with her, without fraud, that he would hold it in trust for her, or if it appeared that the depositary contracted to return the specific or identical property left in his custody, and he converted the thing to his own use by using it in the manner set forth, a trust would result, and he would hold the land or an aliquot part thereof for her, or she would be entitled to a lien on the premises for the amount invested if she so preferred. It follows that the cross-complaint should show, without ambiguity or equivocation, that the depositor delivered the five hundred dollars to the depositary under a contract to restore or return the same when requested or required, and that the consideration for which the lien is claimed by appellant, by virtue of such payment, was paid before the deed was taken. Such allegations would clearly make a case in which the alienee, in violation of his trust, purchased land with money not his own. But we do not think the statement in the cross-complaint that, "after the husband had received said sum of money in his custody, he

took the same and used it in paying a part of the purchase-money in order to enable him to acquire the title and ownership in and to the real estate described in her cross-complaint," is equivalent to an allegation that the funds of the cross-complainant went into the lands at or before the time the title vested in him. It might create an inference to that effect, but the matter quoted is in the cross-complaint by way of recital, and not by way of direct averment, which is essential to good pleading. Of course the rule is elemental that the equitable or trust estate must vest in the *cestui que trust* at the same instant of time that the legal estate vests in the trustee. Perry Trusts (2d ed.), section 133; *Reed* v. *Reed*, 25 N. E. Rep. 1095; *Crawford* v. *Thompson*, 21 Atl. Rep. (Pa.) 994; *Barnet* v. *Dougherty*, 32 Pa. St. 371; *Hughes* v. *White*, 117 Ind. 470. In our opinion the court below did not err in its rulings.

Judgment affirmed, with costs.

Filed May 29, 1894.

No. 16,576.

The City of Delphi et al. *v.* Bowen, Administrator.

Taxes.—*Omitted Property.*—*Power of City Clerk to Assess.*—The city clerk is the proper city officer to assess omitted property, and to give the notice to the owner required to be given in such case by the county auditor.

Pleading.—*Complaint.*—*Taxes.*—*Omitted Property.*—*City Clerk.*—The sufficiency of the complaint in this case, being an action to cancel and declare void certain taxes as levied upon omitted personal property by the city clerk, is decided on the authority of *Reynolds, Audr.*, v. *Bowen, Admr.*, 138 Ind. 434

From the Carroll Circuit Court.

M. A. Ryan, J. H. Gould and *G. R. Eldridge*, for appellants.

R. C. Pollard, C. R. Pollard and *M. Winfield*, for appellee.

HOWARD, C. J.—This was a suit instituted by the appellee against the appellants, in the Carroll Circuit Court, to cancel and declare void certain taxes as levied upon omitted personal property and placed upon the tax duplicate by the clerk of the city of Delphi. On the overruling of demurrers to the complaint, the appellants refused to plead further, and judgment was rendered declaring the added taxes illegal and void, and directing their cancellation.

The property claimed by the city to have been omitted from taxation consisted of moneys, money loaned, and credits owned by appellee's decedent for the years from 1881 to 1890, inclusive.

Section 147 of the tax law of 1881, being section 6416, R. S. 1881, and re-enacted as section 142 of the tax law of 1891, authorized the county auditor, on discovering that any personal property had been omitted, in whole or in part, in the assessment of any year or number of years from the assessment book, or from the tax duplicate, to proceed to assess the same, first giving notice to the owner, occupant or person in possession thereof.

By section 259 of the tax law of 1881, being section 3160, R. S. 1881, and re-enacted in section 254 of the tax law of 1891, Acts 1891, p. 290, it is provided that "cities shall be governed by the provisions of this law, in regard to the matters embraced therein, so far as the same are applicable, and the duties required by the terms of this act to be done by the county officers, shall be performed by the corresponding officers of each city in regard to the assessment

and collection of taxes, and all matters pertaining thereto."

It is not questioned that the city clerk is the city officer corresponding to the county auditor as county officer. The city clerk is, therefore, the proper officer to assess omitted property, and to give the notice to the owner required to be given in such case by the county auditor. The complaint shows that in this case these duties were performed by the city clerk as required by the statute, and that the appellee appeared before the clerk and answered, opposing the assessment of the omitted property. In addition to the powers already named, given to city officers in relation to the assessment of taxes, it was provided in section 259 of the tax law of 1881, section 3160, R. S. 1881, that cities might use the assessment of real and personal property as made and returned by the township assessor, and that the proper city officers should have access to the books in the county auditor's office for the purpose of transcribing therefrom a list of the property assessed. These provisions were re-enacted in section 254, *supra*, of the tax law of 1891, the office of city assessor and the city board of equalization being at the same time abolished.

By virtue of the powers so conferred by the statute the city clerk, in the case at bar, after making his finding as to the amount and value of the property not listed by the decedent and his administrator, and after finding also that such omitted property "has been placed upon and added to the tax duplicate of Carroll county, Indiana, by the auditor thereof," proceeded to make his assessment of the same as follows:

"I now assess said property as omitted property which has unjustly escaped taxation; and I now correct the proper tax duplicates of said city of Delphi, Indiana, accordingly, and add said omitted property thereto, and I

now copy upon said duplicates of said city the amounts of said omitted property as heretofore placed upon and added to the duplicates of Carroll county, Indiana, by the auditor thereof as aforesaid, being the same amounts hereinbefore set forth."

The questions raised in this case, with the exception of those above noted, are precisely the same as those in the case of *Reynolds, Aud.*, v. *Bowen, Admr.*, 138 Ind. 434. The property claimed to be omitted from taxation is identical in the two cases, and the objections made in that case to placing the property on the tax duplicate are repeated in this case. The complaint in that case was held bad, and on the authority of that decision the like complaint in the case at bar must also be held bad.

The judgment is accordingly reversed, with directions to sustain the demurrers to both paragraphs of the complaint, and for further proceedings not inconsistent with this opinion.

Filed Mar. 8, 1894; petition for a rehearing overruled June 22, 1894.

138 238
142 473
138 238
149 605

No. 15,578.

THIEBAUD, TRUSTEE, *v.* TAIT, TREASURER, ET AL.

PRACTICE.—*Motion to Docket Cross-Complaint as Separate Action.*—*Bill of Exceptions.*—A motion by a plaintiff to docket a cross-complaint as a separate action is a collateral one, and must be brought into the record by a bill of exceptions.

SAME.—*Not Available Error to Refuse to Docket Cross-Complaint as Separate Action.*—It is not available error to overrule a motion to docket a cross-complaint as an independent action.

SAME.—*Intermediate Errors.*—*When Not Available for Reversal of Judgment.*—Intermediate errors are not available for reversal if the final judgment is right.

Thiebaud, Trustee, *v.* Tait, Treasurer, *et al.*

TAXES.—*Trustee.* — *Estoppel.—Personal Liability.—Irregular Levy.—Special Finding.—Conclusion of Law.*—A trustee who retains from money which it is his duty to pay to his beneficiary the amount of taxes which he represents is due upon the trust fund, is so far primarily chargeable with the taxes, and is estopped to deny that they were regularly levied, but a conclusion of law holding him personally liable for other unpaid taxes which the special finding does not show that he withheld upon settling with *cestui que trust* is erroneous.

SAME.—*Injunction Payment or Tender of Amount Due.*—Where a part of the taxes sought to be collected are due, a suit to enjoin the collection will not lie unless there is a payment of, or an offer to pay, the amount for which the plaintiff is liable.

From the Switzerland Circuit Court.

W. R. Johnston and *F. M. Griffith*, for appellant.

W. D. Ward, *J. A. VanOsdol* and *G. S. Pleasants*, for appellees.

MCCABE, J.—The appellant alleges that the taxes levied against property held by him as trustee are illegal, and prays that their collection may be enjoined.

The first paragraph of the complaint alleges, among other things, that an assessment for taxes on personal property of the value of $3,800 was entered upon the duplicate by the treasurer, and not by the auditor, and that the assessment was not made by the assessor, as the law requires.

The allegations of the second paragraph are more specific than those of the first, but are of a similar character.

Tait, the treasurer, filed a counterclaim or cross-complaint, in which he alleges that Harriet E. Hull, the beneficiary in the trust vested in Thiebaud, and Charles Dufour, residuary legatee of the creator of the trust, were necessary parties, and asked that they be made parties to the suit. Mrs. Hull and Dufour appeared to the cross-complaint, and were thenceforward treated as parties in court.

A cross-complaint was filed by Mrs. Hull, which contains these allegations: That Charles A. Thiebaud, deceased, bequeathed to John L. Thiebaud, the plaintiff, in trust for her for life, money and demands to the amount of $3,800; that the will required the plaintiff to pay annually on the trust fund placed in his control "an amount equal to six per centum, less the taxes assessed thereon"; that the will provided that at the death of the cross-complainant the principal sum should go to her codefendant Charles Dufour; that the plaintiff accepted the trust and entered upon the discharge of the duties thereof under the will, and received the sum named as such trustee; that while acting as such trustee, taxes were illegally assessed against the trust fund; that the trustee, in his annual settlement with the cross-complainant, represented to her that such taxes were legal charges, and deducted the amount thereof from the annual income due her; that the trustee, although he retained the sum he represented was due for such taxes, never paid them in whole or in part.

The appellant's counsel moved, as the clerk's entries recite, to docket the cross-complaint as a separate suit, but there is no bill of exceptions in the record containing the motion or exceptions. It seems clear, under the rule declared by our decisions, that the motion is a collateral one requiring a bill of exceptions to bring it into the record. See authorities cited in Elliott's App. Proced., sections 190, 191, 192.

But, conceding that the question is well presented, there is no such error as will require a reversal for that cause, if, indeed, there is any error at all; for, whether there was one trial or the trials were separate, could not be prejudicial if the final result reached was right. The motion assumes that there is a cause of action stated in

the cross-complaint, and asks a trial of that cause of action as an independent proceeding, so that the utmost that can be claimed is that there was a trial of several causes of action in one proceeding, when there should have been separate trials of each cause of action. The case is strictly analogous to that of an error in permitting a misjoinder of causes of action. The concession of the motion that there was a cause of action requiring a trial is a tacit one, but it is quite as effective as an express one could be.

The important questions arise on the special findings, and, even if there were intermediate errors, there can be no reversal if the final judgment is right.

Where the record proper—and of that record the special finding is a part—fully shows that intermediate errors did not prejudicially affect the final result, such errors will not be regarded as sufficient to overthrow the judgment from which the appeal is prosecuted. See authorities cited in Elliott's App. Proced., sections 590, 635, 653.

So much of the special finding of facts as is material to the question in hand is as follows:

"1st. That in April, 1871, one Charles A. Thiebaud died testate, in Switzerland county, Indiana, leaving an estate.

"2d. By the terms of that will, the portion of his estate that might accrue under said will to his daughter, Harriet E. Dufour (who afterward intermarried with Hull), was vested in appellant, his son, John L. Thiebaud, in trust, to be by him judiciously invested to bring an income of six per cent., to be paid over to her annually during her life, and, at her death, said income and principal to be continued in charge of said son, as trustee, until the children of said Harriet shall become of age,

when said trustee or his successor shall pay over the sum total. * * *

"3d. That the said Harriet E. Hull is defendant herein, and that defendant herein, Charles Dufour, is her only child, and is now 25 years of age.

"4th. That the estate of Charles A. Thiebaud was finally settled on the —— day of ———, 1872, and then came into the hands of plaintiff from said estate $3,868.98 as funds impressed with said trust, belonging to said Harriet and Charles Dufour.

"5th. That appellant commingled said trust fund with his own money and used it all in his own individual business, and never made any investment of said trust fund as a trust investment.

"6th. That said trustee has, at all times since said trust funds came to his hands, been a resident of the city of Vevay, Switzerland county, Indiana, and the amount of said trust funds were subject to taxation in said township and city for State, county, and city purposes, as they came into the hands of such trustee as money, and have never been invested as a trust fund, and he has, in his reports to the court, charged himself with $3,811.67 as principal of said trust fund; that it was adjudged, on exceptions to one of his reports by said *cestui que trust*, said Harriet, in 1885, by agreement, with the consent of the court, that there was a settlement of all back interest on said funds up to the 2d of March, 1885, and that he was to be charged with said trust funds as in money, and should pay six per cent. thereon annually to said Harriet E. Hull, less the taxes thereon.

"6½. That the taxes thereon have not been paid since 1879.

"7th. That in his settlement with said Harriet E. Hull, he has, since 1885, deducted from the annual interest of said fund for each year a sum equal to the State,

county, and city tax, which should have been assessed against said fund according to the rate of taxation for said several years; that all the interest except said sums so deducted as aforesaid, has been paid over to said Harriet E. Hull, up to the 2d day of March, 1889.

"8th. That the rate of taxation, as fixed by the proper authorities, is stated for each year from 1879 to 1888, both years inclusive, making the amount of tax that would accrue on said trust fund of $3,810:

"For the year 1879	$43 43
" " " 1880	48 77
" " " 1881	52 20
" " " 1882	54 48
" " " 1883	59 63
" " " 1884	59 44
" " " 1885	55 25
" " " 1886	55 25
" " " 1887	57 15
" " " 1888	57 15
Total	$542 75

And that the same is equitably due and owing to the county, and should have been paid by said John L. Thiebaud.

"10th. That said trust has not been managed in accordance with the directions in said will and law."

So much of the conclusions of law as are material are as follows:

"1st. That the plaintiff is not entitled to any relief on his complaint.

"2d. * * * Plaintiff is chargeable with interest on said trust fund in his hands, at six per cent. per annum, less the taxes of the State and county of each cur-

rent year in the city of Vevay, in Jefferson township, Switzerland county, Indiana.

"3d. That said John L. Thiebaud is liable primarily to pay the taxes to the county, to wit, $542.75, as he has retained from the interest on said trust fund in his settlements with said Harriet E. Hull.

"4th. That the trust estate has not been managed in accordance with the requirements of said will and the law in reference thereto.

"5th. That said trustee should be removed and required to account for said amount found in his hands, to wit: $3,811.67, and interest thereon from the 2d day of March, 1889, and file the receipts of the treasurer of the county for the taxes herein found due the county, and the taxes which the city of Vevay may have against said fund, which have been retained by said Thiebaud in his settlements with his *cestui que trust*, or on his failure to pay said taxes, then account in money for the said several sums, upon settlement of his said trust with this court." Dec. 13, 1889.

The decree is as follows: "It is, therefore, considered and adjudged by the court, that the defendant William Tait, treasurer of Switzerland county, Indiana, recover upon the second paragraph of his cross-complaint the sum of $542.75 as above found to be due for taxes, together with interest thereon from the 13th day of December, 1889, collectible without relief, etc., with costs, etc. It is further adjudged that said judgment for taxes shall be collected primarily from the individual property of said John L. Thiebaud, and if the same shall not realize a sum sufficient to pay the said judgment for taxes, the balance to be collected from the fund of said trust estate in his hands as such trustee. It is further considered and adjudged by the court, that the said John L. Thiebaud be, and he is, hereby removed from the exe-

cution of his trust as trustee of said Harriet H. Hull, and that he pay into court the sum of $3,811.67, and interest from the 2d day of March, 1889, less any amounts he may have paid out for taxes on said trust fund, or for the use and benefit of his said ward since said March 2, 1889, to be disposed of as the court may hereafter order and direct, and said Harriet E. Hull and Charles Dufour recover of plaintiff John L. Thiebaud their costs herein, etc."

It will be seen by the special finding of facts, that the interest withheld by appellant from Mrs. Hull was deducted out of the interest that accrued for the years next following the year 1885, and the amount so withheld was an amount equal to the State, county, and city tax, which should have been assessed against said fund according to the rate of taxation for said several years. As the interest was to run from the 2d day of March, 1885, on the 2d day of March each year would be the time the annual interest for the year preceding would be due. The first settlement, therefore, after 1885, must have been made March 2, 1886; now whether the court meant that the tax for the year 1886 was deducted from the year's interest ending March 2, 1886, and so on for the subsequent years, is not made clear by the special finding. If that was the intention, then there could only be a recovery for an amount equal to the tax for three years, namely, for 1886, 1887 and 1888, because the finding fails to show what the tax for 1889 was.

But when we remember that the amount of taxes on such property can not be known for any particular year, as early as the 2d day of March of such year, because not assessed yet and spread on the duplicate, it must have been intended by the court, that when the interest falling due March 2, 1886, was paid, the tax for the preceding year, 1885, was deducted therefrom, and so on

through until the settlement of March 2, 1889, up to which time the special finding shows the interest had been paid less the taxes. Out of that year's interest the court must have intended to find that the taxes of 1888 had been deducted. That would be the taxes for the years from 1885 to 1888, both years inclusive were deducted from an equal number of years, interest; that is to say, the taxes for 1885 amounting to $55.25; for 1886, $55.25; for 1887, $57.15; for 1888, $57.15; making in all $224.80, were withheld from the interest due Mrs. Hull. To the extent of this amount, and no more, under the construction of the special finding most favorable to appellees, had appellant by his conduct estopped himself from questioning the validity of the tax, or his liability to pay the same. As to all the balance of the $542.75 to wit: $317.95, appellant could not be compelled to pay them, because it does not appear from the special finding that said taxes had been legally assessed and levied, or that he had done anything to estop him from denying the legality of said taxes or assessment prior to March 2, 1885. Nevertheless, if by the judgment recovering the whole of them by the treasurer against appellant trustee, they are to come out of the trust fund in the hands of the trustee, he would not be harmed, and, therefore, the error of permitting them to be so recovered would be harmless as to him; and as the only person complaining of the judgment on this appeal is such trustee, the error would be unavailable. Both beneficiaries in the trust fund, being all the persons interested therein, were made parties below, and are parties to this appeal, and are not complaining of the judgment.

But they had no ground to complain because a proper construction of the decree shows that the whole amount of taxes recovered is to be paid out of the individual means of the trustee, for which he is to receive no credit

in his accounting on the surrender of the trust. In *Fleenor* v. *Driskill*, 97 Ind. 27, at p. 33, this court said: "If the entry of a judgment be so obscure as not to express the final determination of the court with sufficient accuracy, reference may, and indeed ought to, be had to the pleadings, and the entire record, when construing the judgment." Citing Freeman Judg., section 45; *Foot* v. *Glover*, 4 Blackf. 313; *Finnagan* v. *Manchester*, 12 Iowa, 521; *Fowler* v. *Doyle*, 16 Iowa, 534; *Bell* v. *Massey*, 14 La. Ann. 831; *Hopper* v. *Lucas*, 86 Ind. 43.

When we recur to the conclusions of law, we find it there stated as the law arising on the facts found, that appellant is liable primarily to pay the taxes to the county, to wit, $542.75, and for mismanagement of the trust he should be removed and required to account for the principal of the fund, $3,811.67, and interest thereon from March 2, 1889, and file the receipts of the treasurer for the taxes herein found due, and the taxes which the city of Vevay may have against said fund, which have been retained by said Thiebaud in his settlements with his *cestui que trust*, or on his failure so to do, then account in money for said several sums.

This, it seems, means that the appellant is to pay into court the principal of the trust fund, $3,811.67, and interest thereon since march 2d, 1889, and, in addition thereto, it means that appellant, trustee, is required to pay the treasurer the taxes found due, to wit, $542.75, not out of the principal of the trust fund, or any interest thereon in his hands, but out of his own individual means, for which he is to receive no credit. This is evident because the language employed proceeds on the assumption that appellant has retained an amount equal to this sum out of the annual interest due his *cestui que trust* under pretense that the tax was valid, and that he had paid it, or would pay it. The decree following the conclu-

sions of law makes this view abundantly clear by requiring him to pay the judgment for taxes, $542.75, to the treasurer and file the receipts or pay it into court on his removal, along with the principal of "the trust fund, $3,811.67, and interest thereon since March 2d, 1889, less any amount he may have paid for taxes on said trust fund, or for the use and benefit of his ward" since that time.

As it does not appear from the special finding, that appellant withheld an amount of the interest due his *cestui que trust* for more than an amount equal to the last four years' taxes, amounting only to $224.80, on pretense of paying the same on said taxes, or that he did anything to estop himself from denying the validity of said taxes accruing prior to 1885, it follows that the conclusions of law and judgment holding appellant liable personally, out of his own individual means, to pay the whole $542.75, can not be sustained. As to whether the evidence does or does not prove that he retained the interest equal to the taxes prior to March 2d, 1885, or whether his conduct in relation thereto was such as to estop him from denying the legality of such tax, we intimate no opinion.

As to the amount of the interest equal to the taxes for the last four years, namely, $224.80, which the special finding shows appellant retained, he is estopped to deny his liability to pay the same to the treasurer, on the ground that the taxes had not been legally levied and assessed. As to that sum, the principles laid down in the former opinion (*Thiebaud* v. *Tait*, 31 N. E. Rep. 1052) in this case are strictly applicable. It was there said: "A trustee who retains from money which it is his duty to pay his beneficiary the amount of taxes which he represents is due upon the trust fund puts himself in such a position that equity will charge him primarily with the taxes, and will hold him estop-

ped to deny that such taxes were not regularly levied. Where a man wrongfully takes money which belongs to another, that other may hold him liable. This is rudimental law. Here the plaintiff did take money which belonged to the public revenues. It belonged there by his own representation, and he withheld it from his beneficiary upon the sole ground that he had paid it to those entitled to receive it. His representation that he had paid the taxes, although not true, shows that he knew the property was subject to taxation, and, knowing this, he knew that the money which he withheld from Mrs. Hull belonged to the public. We are not here dealing with a case where the property was exempt from taxation. If we were, there might, perhaps, be some difficulty in holding the appellant estopped to deny the validity of the special assessment; but, so far from dealing with such a case, we have here one in which the property was subject to assessment, and the only infirmity is that the taxes were assessed and placed upon the duplicate by the wrong public officer.

"The case is one in which there was a right to make an assessment. The property was justly subject to taxation, and, if the assessment had been made by the proper officer, collection of the taxes could have been coerced, even against persons who had not been guilty of fraud. There is not the slightest difficulty in applying the doctrine of estoppel to the appellant. He obtained the money he holds by his false representation, and by that representation he must abide. When it was ascertained that the appellant was endeavoring to escape taxation on money held as a trust fund by asserting that in paying taxes on his own real estate he had paid taxes on the trust property, the treasurer had a right to bring the beneficiaries into court, in order that all questions concerning the ownership of the property and its liability to taxation

might be determined in one suit. He was not bound to bring in such parties, but he had a right to do so, inasmuch as they were concerned in the property which was the subject of controversy.

"The case is a peculiar one. The plaintiff insisted by his complaint that the real estate on which he had paid taxes was trust property, and that the money was his own; while the treasurer discovered, as he believed, that the money belonged to the trust, and as such was subject to taxation, and that the real estate belonged to the plaintiff in his own right.

"The wrongful conduct of the plaintiff made it proper, if not necessary, to have all interested in the property in court, and he is not in a situation to successfully complain that they were made parties to the suit. As the parties were in court, it became necessary and proper to determine the whole controversy between all the parties. One great object of a suit is to put an end to a controversy concerning all the interests in the property involved in the dispute between the parties litigant. * * * It is a familiar principle of equity jurisprudence that, when a court of chancery obtains jurisdiction of a controversy for one purpose, it will retain it for all. *Feder* v. *Field*, 117 Ind. 386."

From what we have said, it follows that appellant had, by his conduct, placed himself in an attitude rendering himself liable to pay to the appellee, treasurer, the sum of $224.80 on said taxes; and as his complaint sought to enjoin the whole of said taxes, to wit, $542.80, without paying or offering to pay the portion thereof for which he was liable, the appellant was not entitled to any relief on his complaint, and the conclusion of law to that effect was correct. *Brown* v. *Herron*, 59 Ind. 61; *Foresman* v. *Chase*, 68 Ind. 500; *Mullikin* v. *Reeves, Treas.*, 71 Ind. 281; *Board, etc.*, v. *Dailey*, 115 Ind. 360.

But that part of the conclusions of law which holds the appellant personally liable under the cross-complaint to pay the whole of the $542.75, or any more thereof than said sum of $224.80, is erroneous; and, in so far as said conclusions of law authorize the treasurer, under his cross-complaint, to recover any more of said taxes from appellant than said sum, they are erroneous.

Appellees' learned counsel, on the rehearing, have attempted to defend these conclusions of law on the sole ground that the terms of the will which imposed the trust on the appellant required him to pay all the taxes on the trust fund, out of his own individual means, if he could not make enough out of the trust fund over and above the 6 per cent. interest, which the will required him to pay over annually to the beneficiary in the trust; and that if he would escape the liability to pay such taxes out of his individual means, he must apply to the court to relieve him therefrom. No such suggestion was made on the first hearing, and the trial court made no such ruling, but ruled to the contrary. There is nothing in the will creating the trust that has the slightest bearing in that direction. It simply directs the trustee to judiciously invest the fund so as to bring an income of six per cent., which is to be paid over annually to said beneficiary. There is no room for such a construction of the trust created. The other conclusions of law are correct.

The judgment against appellant on his complaint, and the judgment against him on the cross-complaint of the appellee, Mrs. Hull, are affirmed, and the judgment against the appellant on the cross-complaint of the treasurer is reversed, the cause remanded, with instructions to the court below to grant appellant a new trial on the cross-complaint of said treasurer, and for further proceedings in accordance with this opinion.

Filed Feb. 20, 1894.

No. 16,695.

PURNER *v.* KOONTZ ET AL.

VENIRE DE NOVO.—*When Should Not Be Granted.—Informal Verdict.*—A *venire de novo* should not be granted where the verdict is merely informal, but the court can understand it and render judgment thereon.

From the Montgomery Circuit Court.

J. C. Suit, *J. Claybaugh* and *N. P. Claybaugh*, for appellant.

W. R. Moore, for appellees.

HOWARD, C. J.—The appellant filed his complaint against the appellees, alleging that he was the owner of the undivided one-half of certain real estate described, and that the appellees were the owners of the remaining one-half, and asked for partition.

To this complaint, appellees filed a pleading which is styled an answer, but which is, in effect, a cross-complaint, and in which they admit substantially, all the facts pleaded in the complaint, but aver that the appellant received from the common ancestor and former owner of said lands advancements to an amount in excess of the full value of the lands to be partitioned, and ask that the court determine the amount of such advancements, and then make such decree of partition as will equalize the interests of the parties in the estate of said ancestor. To this pleading a general denial was filed.

The issues were submitted to a jury, who, after hearing the evidence, returned the following verdict:

"We, the jury, find that advancements were made to John Purner by his father, Amos Purner, amounting in value to five thousand and six hundred twenty-five dol-

lars ($5,625), and we find that the real estate described in the complaint is of the value of thirty-eight hundred dollars ($3,800)."

The only question argued in appellant's brief is that the court erred in overruling the motion for a *venire de novo*.

There is no issue between the parties, except as to the advancements made to appellant; and there was, therefore, nothing for the jury to find in its verdict but whether such advancements had been made, and, if so, the amount as compared with the land to be partitioned.

Counsel for appellant contend that the verdict is imperfect, for the reason that there should have been a finding for the plaintiff or for the defendant upon the issue of partition. This is, perhaps, true; but the defect is an informality, the facts found show that the appellant is not entitled to partition, that he has no interest in the real estate, but has already received more than his rightful share of the ancestral property.

Advancements must be taken into consideration in the partition of lands. Section 1203, Burns' Rev. Stat. 1894; *Scott* v. *Harris*, 127 Ind. 520; *New* v. *New*, 127 Ind. 576.

A verdict is good if the court can understand it, even though it may be informal. *Jones* v. *Julian*, 12 Ind. 274.

If, upon reasonable intendment, it can be seen that the verdict covers the issues, the court will disregard form and make the verdict serve. *Chambers* v. *Butcher*, 82 Ind. 508; *Board, etc.*, v. *Pearson*, 120 Ind. 426; *Vanvalkenberg* v. *Vanvalkenberg*, 90 Ind. 433.

In *Woolery* v. *Woolery*, 29 Ind. 249, a verdict quite similar to the one here objected to was not challenged.

In the case at bar, although the pleadings, and also the proceedings of court, including both the verdict and

the judgment, are informal and rightly subject to criticism, yet it is clear, from the record, that the ultimate judgment, "that the plaintiff take nothing by his suit," is absolutely correct, and no good end would be served by sending the case back for the correction of crude forms and irregularities.

The judgment is affirmed.

Filed Mar. 28, 1894; petition for a rehearing overruled June 19, 1894.

No. 17,172.

Cross *v.* The State.

Criminal Law.—*Rape.*—*When Evidence of Another Crime Admissible.*—*Keeping House of Prostitution.*—In a prosecution for rape, it is competent for the State to prove, for the purpose of showing a motive for the crime of rape, that the place to which the defendant took the prosecuting witness was a house of prostitution kept by him.

From the Grant Circuit Court.

C. W. Watkins, *J. C. Branyan*, *G. E. Meyers* and *J. S. Branyan*, for appellant.

A. G. Smith, Attorney-General, *C. M. Ratliff*, *O. L. Cline* and *W. A. Branyan*, for State.

Coffey, J.—This is a prosecution against the appellant, commenced in the Huntington Circuit Court, in which he is charged with the crime of rape.

A trial of the cause resulted in a conviction of the appellant, which judgment of conviction was reversed by this court. *Cross* v. *State*, 132 Ind. 65.

Upon a return of the cause to the Huntington Circuit Court, the appellant procured a change of venue, and

the cause was sent to the Grant Circuit Court. Another trial again resulted in the conviction of the appellant, from which last judgment this appeal is prosecuted.

The assignment of error calls in question the propriety of the ruling of the circuit court in overruling appellant's motion for a new trial.

It is first claimed by the appellant, that the court erred in admitting certain evidence on the trial of the cause, offered by the State, to which objection was made by him at the time.

As preliminary to the question here presented, it may be remarked that the evidence in the cause tends to prove that the appellant resided with the mother of the prosecuting witness, in the city of Huntington, where they kept a house of prostitution. The witness is about sixteen years of age, and prior to the crime charged, had not resided with her mother since she was a small child. Shortly prior to the crime, the mother and the appellant went to Miami county, where the injured party was then residing, and induced her to go to their house in the city of Huntington. Within five days after she arrived in Huntington she was outraged by the appellant. The evidence tends to show that the mother was a party to the crime.

It is contended by the appellant, that the circuit court erred in permitting the State to prove that the place to which the appellant took the prosecuting witness, was a house of prostitution, kept by himself, for the reason that it was proving him guilty of a crime other than that for which he was on trial.

It is undoubtedly the *general* rule that the State can not prove the accused guilty of a crime other than the one with which he stands charged, but, like most other general rules, it has its exceptions.

Rice on Evidence, vol. 3, section 155, says: "Al-

though evidence in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible. If the evidence offered tends to prove material facts, it is admissible, although it may also tend to prove the commission of another separate and distinct offense."

It is always competent for the State to prove the accused guilty of another crime, if such other crime furnishes a motive for the one upon which he is on trial. Gillett's Crim. Law, p. 653; 3 Russell Crimes (9th ed.), 283; Abbott's Trial Briefs, 371; *Stout* v. *People*, 4 Parker's Crim. Reports (N. Y.), 71; *Carroll* v. *Commonwealth*, 84 Pa. St. 107; *People* v. *Wood*, 3 Parker's Crim. Reports (N. Y.), 681.

We are of the opinion that the court did not err in admitting the evidence of which complaint is made.

It is further argued that the circuit court erred in giving instructions of its own motion and in refusing to give instructions asked by the appellant.

We have carefully read all the instructions given by the court, as well as those asked and refused, and feel warranted in saying that the court did not err in either giving or refusing to give instructions in this case. The instructions given by the court embraced all that is contained in those asked, to which the appellant was entitled.

There is no error in the record for which the judgment should be reversed, and the same is, therefore, affirmed.

Filed June 5, 1894.

No. 16,729.

138 257
158 89

Brown *v.* Brown.

Divorce.—*Affidavit of Residence, etc.—Before Whom Made.*—In a divorce proceeding, the affidavit of residence and occupation, as required by the statute, may be made before any officer of the State authorized to administer oaths.

Same.—*Complaint, Sufficiency of.*—Where the complaint alleges certain facts quite generally, which, upon motion, might have been made more specific, but others are specific as to acts of cruelty, the complaint can not be held insufficient.

Same.—*Residence, How Established.—Statutory Requirement Indispensable.—Judicial Notice.—Sufficiency of Evidence.*—Where residence is proven by several witnesses, only two of whom appear to be freeholders, the residence of one of such freeholders not being disclosed, and the residence of the other being given as "Bainbridge, Monroe township," the court will take judicial notice that the latter was a resident freeholder of this State, but can not do so as to the former; and as proof of residence, as required by the statute, can not be dispensed with, the evidence was not sufficient to sustain a finding for plaintiff.

From the Putnam Circuit Court.

H. H. Mathias and *S. A. Hays*, for appellant.

P. O. Colliver, for appellee.

Hackney, J.—The appellee sued for, and obtained, a decree of divorce and the custody of her infant child.

In this court the appellant denies the jurisdiction of the circuit court, from the fact that the affidavit of residence and occupation, as required by section 1031, R. S. 1881, section 1043, R. S. 1894, was sworn to before a justice of the peace and not before the clerk of said court.

The provision of the statute that such affidavit shall be sworn to before the clerk of the court in which the complaint is filed, was, in effect, held by this court in the case of *Eastes* v. *Eastes*, 79 Ind. 364, to be directory

merely, and since that decision the universal practice has been to take such oath before any officer of the State authorized to administer oaths.

The appellant's demurrer to the complaint was overruled, and it is claimed that this ruling was erroneous. Some of the allegations are quite general, and, upon motion, would have been made more specific; others, especially a charge of an assault and battery and the drawing upon and threatening to kill the appellee with a knife are acts of cruelty specifically pleaded, and, with an allegation of the clandestine removal of the two year old child of the parties from appellee's custody to the State of Iowa, are sufficiently definite.

Considering the failure to ask that general allegations be made specific, and taking such facts as admitted by the demurrer, we can not say that they were insufficient to constitute a cause of action.

It is insisted that the proof of residence in the county for six months and in the State for two years immediately preceding the filing of the petition was not made upon the trial by two witnesses who were "resident freeholders and householders of the State," as required by said section 1031, R. S. 1881; section 1043, R. S. 1894.

One witness, Archibald Allen, testified to his residence at "Bainbridge, Monroe township," and that he was a freeholder and householder. If we may presume that "Bainbridge, Monroe township," is in Indiana, this witness was one meeting the requirements of the statute. Another witness, William Call, testified that he was a freeholder and householder, but his place of residence was not disclosed. These two witnesses, with others, not shown to have been either freeholders or householders, testified to the appellees' residence in the county and State the required period. The purpose of the statutory requirement that proof of residence shall be

made "by at least two witnesses who are resident freeholders and householders of the State," is to give more than ordinary assurance that the proceeding is meritorious, and that citizens of other states are not resorting to the laws of our State to be relieved from the sacred contracts of marriage, through false testimony. Though we were permitted to take judicial cognizance that "Bainbridge, Monroe township," is in Indiana, we have no information that the witness Call was a freeholder and householder "of the State." If we may sanction the finding of residence upon the evidence of one witness, we may dispense with the requirement of the statute. To do this would be to abandon the good purposes of the statute, and return to the abuses which induced its enactment. The case of *Maxwell* v. *Maxwell*, 53 Ind. 363, in no way relaxes the requirements of the statute. There it was expressly found that the two witnesses testifying to the residence of the petitioner were resident householders and freeholders of the State. In *Powell* v. *Powell*, 53 Ind. 513, it was held that proof of residence as required by the statute could not be dispensed with.

Other questions presented by the record may not arise upon another trial, and for that reason are not considered. For the error of the circuit court in overruling the motion for a new trial for the reason that the finding was not sustained by the evidence, the judgment is reversed, with instructions to sustain said motion.

Filed April 19, 1894; petition for a rehearing overruled June 21, '94.

16,870.

NEVERS *v.* HACK ET AL.

FRAUDULENT CONVEYANCE.—*Complaint.—Recovery.—Necessary Allegations and Proof.*—In an action to set aside a fraudulent conveyance, it must be both alleged and proven, before the plaintiff can succeed, that at the time of the conveyance, and at the time the suit was brought, the debtor did not have enough property left, subject to execution, to pay his debts.

SAME.—*Insolvency at Time Suit is Brought to Set Aside Conveyance.—Relating Back.—Presumption.*—The fact that insolvency exists at the time suit is brought to set aside a fraudulent conveyance, does not raise the presumption that the insolvency existed prior to that time, and does not extend the insolvency back to the time the conveyance was made.

From the Lake Circuit Court.

C. N. Morton, for appellant.

MCCABE, J.—The appellant, as a creditor of the appellee Angeline Hack, sued her and her co-appellees John M. Hack and Joseph L. Hack, to set aside an alleged fraudulent conveyance to each of the two latter, by said Angeline, and subject the real estate so conveyed to satisfy appellant's debt. Issues were formed, on which a trial resulted in a finding and judgment in favor of appellees that appellant take nothing by his suit, and for costs.

The action of the court in overruling appellant's motion for a new trial is assigned for error, and is the only error complained of here. The only grounds assigned therefor in the motion for a new trial are that the finding is not sustained by sufficient evidence, and is contrary to law.

It appears from the evidence, that the alleged fraudulent conveyances were made on the 7th day of October, 1891, and that appellant recovered a judgment against

said Angeline, February 19, 1892, for $2,637.50, on two promissory notes for $1,200 each, executed by said Angeline with another, on March 1, 1890, each due one year after date.

An execution issued on said judgment March 17th, 1892, was returned June 3d, 1892, showing a sale of property of said Angeline, for $200, on said writ, and that the sheriff could find no other property, either real or personal, belonging to her and subject to execution. Of the money returned, $164.85, the balance of the $200 left after the payment of costs, was applied on the judgment. Another execution was issued July 14th, 1892, and was returned August 13th, 1892, by the sheriff, in which return he states that he demanded property of said Angeline, and she thereupon presented a schedule of her property and demanded that the same be set apart to her as exempt from levy and sale; that he caused the property to be appraised, showing its value to be $430, and the return then states "which schedule and appraisement are returned herewith and made a part hereof. I therefore return this writ not satisfied." This suit was begun on the 15th day of August, 1892.

There was no evidence to establish the insolvency of the appellee, Angeline, at any time, other than the two returns of the two executions already set forth. It is the settled law in this State, that it must be both alleged and proven, before an alleged fraudulent conveyance can be avoided, that at the time of the conveyance, and at the time the suit is brought, the debtor did not have enough property left, subject to execution, to pay his debts. *Pence* v. *Croan*, 51 Ind. 336; *Sherman* v. *Hogland*, 54 Ind. 578; *Evans* v. *Hamilton*, 56 Ind. 34; *Bentley* v. *Dunkle*, 57 Ind. 374; *Romine* v. *Romine*, 59 Ind. 346; *Deutsch* v. *Korsmeier*, 59 Ind. 373; *Price* v. *Sanders*, 60 Ind. 310; *Whitesel* v. *Hiney*, 62 Ind. 168; *Spaulding* v.

Myers, 64 Ind. 264; *Noble* v. *Hines*, 72 Ind. 12; *Bruker* v. *Kelsey*, 72 Ind. 51, and many other cases too numerous to cite.

Counsel for appellant concedes this to be the law in this State, but contends that if the insolvency of the debtor be established, or proven to exist, at the time the suit is brought to avoid the conveyance, that carries with it the presumption that such insolvency existed prior to that time, and extends back to the time when the conveyance was made, and cites in support of that proposition, *Lee* v. *Lee*, 77 Ind. 251.

That case, and perhaps some others, among which are *Bruker* v. *Kelsey*, *supra*, and cases there cited, hold that a return of an execution *nulla bona* shortly before the suit is brought may be sufficient *prima facie* to prove that the grantor did not have property, at the time the suit is brought, subject to execution, sufficient to pay his debts. But none of them holds that such return is sufficent to prove that he did not have such sufficient property at the time the conveyance was made.

In support of the contention that such return is sufficient, we are referred to *Strong* v. *Lawrence*, 58 Iowa, 55, and *Carlisle* v. *Rich*, 8 N. H. 44, both of which hold that "where it is found that a debtor is insolvent at the time the judgment is rendered, and is unable to respond to the amount recovered, his insolvency will be considered as extending back beyond a voluntary conveyance of his property made during his indebtedness, unless the contrary is shown."

This doctrine virtually puts the burden of proof upon the wrong party. It in effect amounts to saying to a party charged with a fraudulent conveyance, you must prove yourself innocent before the party preferring the charge is required to prove anything. The first case last above named further says: "The party who sets up a

voluntary conveyance in opposition to the claims of pre-existing creditors, is required to show that the means of the donor, independent of the property conveyed were abundantly ample to satisfy all his creditors." This doctrine prevails in some of the States but never has in this State.

This court was asked in *Sell* v. *Bailey*, 119 Ind. 51 to overrule all the Indiana cases, and adopt this doctrine. It was there said: "The principle which our cases assert, and in various phases apply, is substantially that asserted in *Rice* v. *Perry*, 61 Me. 145, where it was said: "A fraudulent purpose is an important element in the case, but it is not the only one; there must be superadded to it in addition to the sale, actual fraud, hinderance, or delay resulting therefrom to the creditors. * * * This is a rule of pleading as well as of evidence. Hence, a bill which contained no allegations that the debtor at the time of the alienation, was insolvent or embarrassed, was held bad, for it is only when an inadequate amount of property remains that creditors have the legal right to complain. * * * We adhere to our decisions, not only upon the principle of *stare decisis*, but also for the reason that they justly express the law."

The case of *Hartlepp* v. *Whiteley*, 129 Ind. 576, was reversed because the special finding failed to state that the grantor had no other property than the land, either at the time of the conveyance or from that time to the time suit was brought. The same case is re-reported in 131 Ind. 543.

To the same effect are *Line* v. *State, ex rel.*, 131 Ind. 468; *Winstandley* v. *Stipp, Guar.*, 132 Ind. 548; *McConnell* v. *Citizens' State Bank, etc.*, 130 Ind. 127.

The precise point contended for by appellant, and on which his appeal depends, was ruled against him in

Petree v. *Brotherton*, 133 Ind. 692, wherein, at page 694, it is said: "It is also averred that the plaintiff caused an execution to issue on his judgment to the sheriff, and the same was returned, 'no property found to satisfy the same or any part thereof.' * * * The statement that he did not have property subject to execution at the time the action was commenced, or at the time an execution was issued and returned, is not a sufficient compliance with the well established rule of pleading in such actions."

It is a general rule of evidence, that the *allegata et probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the essential allegations of the pleading. 1 Greenleaf Ev., section 51; *The Brig Sarah Ann*, 2 Sumn. 206.

Tested by this rule, the evidence in this case was not sufficient, and fell short of supporting the complaint. There was no conflict in the evidence, the appellees not having offered any, of any kind, on the trial. We are entirely without the aid of any brief on the part of the appellees. It is to be regretted that no rule of this court has ever been formulated by which the consequences of such serious dereliction of duty on the part of one securing the judgment of the trial court in his favor can be visited upon him in this court.

An appellee does this court and himself great injustice in throwing the burden on the court of hunting up the authorities that support the conclusions of the trial court, where the authorities afford such support.

There was no error in overruling the motion for a new trial.

The judgment is affirmed.

Filed June 6, 1894.

No. 17,255.

138 265
149 459

BEATY *v.* VORIS ET AL.

APPEAL.—*Dismissal.—When Prosecuted Under Decedent's Act, When Under the Code.*—Where an administrator petitioned for an order to sell land to satisfy an allowed claim secured by a lien on the land, and other creditors being made parties thereto upon their own motion, filed a cross-complaint to which the claimant was made a party, and issues being joined on the cross-complaint, the trial resulted in a judgment thereon against the claimant, setting aside and disallowing the claim, an appeal from such proceeding is governed by the decedent's act; and if, in such case, an appeal is desired to be prosecuted after the expiration of the thirty days allowed by statute, leave must be obtained of the appellate tribunal, in accordance with the statute.

From the Bartholomew Circuit Court.

M. D. Emig, for appellant.

M. Hacker and *C. F. Remy*, for appellees.

COFFEY, J.—The appellant, Josiah Beaty, filed his claim, consisting of a note secured by mortgage, against the estate of Sarah Brown, deceased. The claim was allowed by the administrator of her estate, and was declared a lien on all the land of which she died seized.

The administrator then filed his petition in the Bartholomew Circuit Court, praying an order to sell the land to make assets with which to pay the claim, whereupon the appellees, Samuel M. Voris and William H. Butler, having claims against the estate, were, on their own motion, admitted as parties to the proceeding, and filed a cross-complaint, to which they made the appellant a party defendant.

Such cross-complaint alleged, among other things, that the note held by the appellant against the estate of Sarah Brown was without consideration, and they prayed that the order to be made for the sale of the land be

made for the payment of their claims, and that the allowance of the claim of the appellant be set aside and such claim disallowed.

Issue was made on this cross-complaint, and, upon a trial by the court, a finding and judgment was entered in favor of the appellees and against the appellant.

This appeal is prosecuted under the code, and not in accordance with the provisions of the decedents' act. The appellees, for this reason, move to dismiss the appeal.

The only question, therefore, for our consideration is the question as to whether the appeal, under the facts above stated, is governed by the code, or whether it is govered by the provisions of the statute relating to the settlement of decedents' estates.

It is to be observed that all these proceedings were had under an application of the administrator to sell the land of the decedent to make assets with which to pay debts.

It is settled that an appeal from a petition by an administrator to sell lands to make assets for the payment of debts is not governed by the code, but such appeal must be taken pursuant to the provisions of the statute governing the settlement of decedents' estates. *Galentine* v. *Wood, Admr.*, 137 Ind. 532.

The administrator of the estate of Sarah Brown is a necessary party to this appeal, as he would not be bound by any judgment we might render, unless he was in this court. In view of these facts, and as it is perfectly evident that no legal settlement of the estate can be had pending this appeal, we are of the opinion that the proceeding is so connected with the settlement of a decedent's estate as to require that the appeal should be taken under the provisions of the decedent's act. If parties desire to appeal cases of this character after the expiration

of the thirty days allowed by statute, they must make application to this court for leave to appeal, in accordance with the provisions of the statute upon that subject.

Appeal dismissed, at the costs of the appellant.

Filed June 8, 1994.

No. 16,805.

HAWKINS *v.* STANFORD, TRUSTEE, ET AL.

PLEADING.—*Answer, Sufficiency of.—Theory.—Injunction.*—An answer to a complaint in a suit for injunction is sufficient where the conduct complained of is confessed, and the answer is justified by a theory sufficient, though different from that upon which complaint is made.

HIGHWAY.—*Established on Section Line.—Change of Course to Correspond with Partition Line.*—Where a highway has been established upon a section line, public interests require that the highway should not vary its course to correspond with partition lines, and it matters not upon whose land it is located.

COSTS.—*Overruling Motion to Retax.—When not Error.*—There was no error in overruling a motion to retax all costs against defendants, where part of such costs were properly taxable against the plaintiff.

From the White Circuit Court.

T. F. Palmer and *C. C. Spencer*, for appellant.

E. B. Sellers and *W. E. Uhl*, for appellees.

HACKNEY, C. J.—The appellant sued the appellees, a township trustee and a district road supervisor, to enjoin a threatened removal of farm fences.

The complaint was in two paragraphs, each relating to different fences, and the finding and decree was in the appellant's favor upon the second paragraph, and against him upon the first.

Of the first paragraph the appellant states that "Its material allegations are that appellant is, and has been

for more than twenty-five years last past, the owner and in possession of a certain tract of real estate in White county, Indiana, and that during all that time he has continuously maintained a fence on the south line thereof; that the board of commissioners, by a regular proceeding, upon report of viewers regularly appointed and acting, on the —— day of September, 1890, established a highway upon said south line, forty feet wide, where the same was marked and laid out by the viewers; that the center of said highway so marked, laid out and established, was marked and indicated by appellant's said fence; that by order of appellees (who were trustee and supervisor, respectively, of the township wherein said land and highway were situated), on the —— day of March, 1891, appellant moved his said fence north twenty feet, and said highway was then opened forty feet wide, where it was marked and laid out by said viewers and established by said board of commissioners, and ever since said highway has been there maintained, opened, and traveled, and in constant use by the public, and the place where said highway now exists is the same place pointed out to appellant by appellees as such officers, when they ordered appellant to remove his said fence, and appellant's said fence was removed to and has ever since remained at and upon the northern boundary of said highway, as pointed out to appellant by appellees as such officers; that appellees, as such officers, are threatening to, and if not enjoined will, remove appellant's said fence north upon his said lands, and open, use, and work, and cause to be traveled upon, a highway upon appellant's said lands north of and parallel with the said public highway so opened and established as aforesaid, to appellant's great damage."

To this paragraph of complaint the appellees answered, by way of amended second paragraph of answer, ad-

mitting appellant's ownership and possession of the east half of section 26, township 25 north, of range 6 west, in White county; that on the 3d day of September, 1890, upon proper petition, notice, view, marking, and report, the board of commissioners of said county did establish a line of highway commencing at the southwest corner of section 27 in said township and range, and running thence east two miles, on the line dividing sections 27 and 34, and 26 and 35, to the southeast corner of said section 26, and did order the same to be opened and kept in repair, to the width of forty feet; that pursuant to said proceeding the auditor of said county delivered a certified copy of said order to these appellees; that the fence mentioned in said paragraph of complaint theretofore and still stood upon said highway, and the appellant, though properly notified, failed and refused to remove said fence within the season and within the time allowed by law, and that all that the appellees were threatening or intending to do was to obey the order of said board.

The court overruled appellant's demurrer to this answer, there was a reply in general denial, a submission, trial, and finding for the appellees. All costs were adjudged against the appellant, "except costs of filing complaint, issue of summons, service and return thereof, which costs are taxed against the" appellees.

The appellant's objection to the answer is that it was not responsive to the complaint, and the argument is that the complaint alleges a location and marking, by the viewers, of a highway upon the line of the appellant's fence, as the section line, and that the highway so located and marked had been opened by the removal of the fence. This we understand to be the true theory of the complaint, but we are unable to agree with the counsel in the contention that the answer should confess the

theory of the complaint and respond to the confessed theory. It is enough when the conduct complained of is confessed, and is justified by a theory sufficient, though different from that upon which complaint is made.

The answer in question, in effect, confesses the conduct complained of, and pleads affirmatively in avoidance the legal proceedings by which the highway was viewed, located and marked upon the line of the section, where, by the conduct confessed, the appellees would have opened it by the removal of the appellant's fence. Conceding, but not deciding, that the locating and marking of the highway were issues upon which oral proof was admissible to contradict the report of the viewers, the answer was broad enough to meet such issues, and if these were improper issues, the answer was sufficient, since it pleaded the location and marking by the viewers upon the section line as reported to the board. We have no doubt of the sufficiency of the answer.

There was evidence supporting the finding and decree of the court, and we will not weigh all of the evidence to ascertain whether the decree was supported by the preponderance of the evidence. Nor do we deem it a proper subject of inquiry as to whether the appellant's fence, by adverse possession, represented the section line as the division line between adjoining proprietors. If, as found by the court, the highway was located upon the section line, it matters not upon whose land it was located. The division line, as to the public, was not the section line, and public interests required that the highway should not vary its course to correspond with partition lines, however irregular.

The only remaining question before us is upon the judgment of the lower court as to costs. The motion was to so modify the judgment as to tax all costs against the appellees. It has been seen that the appellant suc-

ceeded upon one cause of action and failed upon one cause of action. That the appellees were entitled to recover costs upon the issue decided in their favor, is well settled. *Sidener* v. *Spaugh*, 26 Ind. 317; *Acker* v. *McCullough*, 50 Ind. 447; *Jamieson* v. *Board, etc.*, 56 Ind. 466; *Bothwell* v. *Millikan*, 104 Ind. 162.

The issue upon which the appellant succeeded below was conceded by the appellees, and evidence was not introduced upon it. No question is made as to the distribution of the costs upon the issues found in favor of the parties respectively, and the motion so made by the appellant being clearly improper, it was not error to overrule it.

Finding no error in the record, the judgment of the circuit court is affirmed.

Filed June 7, 1894.

No. 16,470.

Perry *v.* Hamilton.

138 271
143 298

Injunction.—*Insufficiency of Complaint.—Adequate Legal Remedy.*—If a complaint for injunction does not show that the plaintiff would not have an adequate legal remedy for all injury he might suffer, it is insufficient on demurrer.

Same.—*Injury to Freehold.—Cutting and Removing Corn.—Landlord and Tenant.*—An injunction forbidding a tenant from cutting and removing stocks of corn from a field cultivated by him as tenant, can not be justified on the ground that such cutting and removal would be an injury to the freehold.

From the Decatur Circuit Court.

J. K. Ewing and *C. Ewing*, for appellant.

S. A. Bonner, *M. D. Tackett*, *B. F. Bennett* and *D. W. Howe*, for appellee.

COFFEY, J.—On the 16th day of February, 1891, the appellant and the appellee entered into the following written contract, namely:

"Article of agreement between R. M. Hamilton and George Perry. The said Perry has rented of Hamilton the field on the north side of the Brookville road as far on the east as can be cultivated. The said Perry agrees to pay five dollars ($5) per acre, to be tended in corn. The said Perry obligates himself to gather the corn as soon as practicable in the fall, and give possession of the field. The rent to be paid the twenty-fifth of December, 1891."

The land described in this contract was cultivated in corn during the summer of 1891, and, upon the maturity of the crop, the appellant commenced cutting and placing it in shocks. The appellee, claiming that the appellant, under the terms of the contract, was not entitled to take the fodder, commenced this action to enjoin him from proceeding in the work of severing it from the ground.

There is no allegation in the complaint to the effect that the appellant is insolvent. The appellee succeeded in obtaining a perpetual injunction in the circuit court, and this appeal is prosecuted for the purpose of reversing that decree. The question as to whether the facts make a case in which an injunction will be granted is presented by a demurrer to the complaint.

It is a familiar rule that a party having an adequate legal remedy can not maintain an action for an injunction. *Smith* v. *Goodknight*, 121 Ind. 312; *Thatcher* v. *Humble*, 67 Ind. 444; *Bishop* v. *Moorman*, 98 Ind. 1.

Assuming, without by any means deciding, that the appellant was not entitled to the fodder produced on the land described in this contract, we think the appellee has

an adequate legal remedy for the injury of which he complains.

If he was entitled to the fodder of which the appellant was about to deprive him, payment of its value would fully compensate him.

The only reason suggested in argument in support of the action of the court in granting an injunction is that cutting and removing the stocks would be an injury to the freehold. The reason is unsound, because, as between landlord and tenant, the annual crop constitutes no part of the freehold. *Heavilon* v. *Farmers' Bank, etc.*, 81 Ind. 249; *Chicago, etc., R. W. Co.* v. *Linard*, 94 Ind. 319.

The appellant being solvent and able to respond, pecuniarily, to the appellee, for any injury he may be able to establish, we think he has an adequate remedy at law, and for that reason can not maintain an action for injunction. *Miller* v. *Burket*, 132 Ind. 469.

In our opinion, the circuit court erred in overruling the appellant's demurrer to the appellee's complaint in this case.

Judgment reversed, with direction to sustain the appellant's demurrer to the complaint.

Filed Dec. 14, 1893; petition for a rehearing overruled June 6, 1894.

138 274
157 609
138 274
165 200

No. 17,269.

Egan, by Next Friend, *v.* The Ohio and Mississippi Railway Company.

Appeal.—*Dismissal.—Failure to Page, Number Lines, and Make Marginal Notes.—When will not be Reinstated.*—Where an appeal has been dismissed for failure to make marginal notes and for failure to number the lines and pages, in accordance with rule 31 of this court, the appeal will not be reinstated where no excuse is shown for the noncompliance with the rule before dismissal.

From the Daviess Circuit Court.

J. W. Burton, for appellant.

W. R. Gardiner, *J. Harmon*, *E. W. Strong* and *C. G. Gardiner*, for appellee.

Hackney, C. J.—On the 17th day of May 1894, the appeal herein was dismissed for the noncompliance, by the appellant, with rule 31 of this court, requiring the pages and lines of the transcript to be numbered and marginal references to be made in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, orders of the court, and bills of exceptions. The appellant now moves the court to reinstate his appeal, and offers no excuse whatever for his noncompliance with the rule before such dismissal, but shows that since the dismissal he has complied with the requirements of said rule. The importance of the rule, when complied with, to the interests of appellants, and its value to counsel in briefing and arguing causes, and its assistance to the court in considering the questions presented, will suggest, at once, the importance of the rule and the necessity for an enforcement of its requirements. No other index or reference is required to accompany the transcript, and, usually, no other is supplied.

These references the rule requires of appellants, and, as said in *Smith* v. *State, ex rel.*, 137 Ind. 198, the requirements "are not merely directory, and may not be ignored or disregarded. It is not only the right, but the duty, of the court to enforce them."

Having failed to comply with the important requirements of the rule, and the court having sustained the appellee's motion to dismiss the appeal, the appellant asks us to consider a subsequent compliance sufficient cause to reinstate the appeal. To sustain the appellant's motion would be little less than trifling with the rule, and instead of treating the rule as of so little consequence, we are inclined to enforce a more strict compliance with it than has been required in most instances in the past.

If the appellant had made a showing of excusable neglect, the motion would be entitled to greater consideration, but, to take the chances of dismissal for a noncompliance with the rule, and then to be rewarded by a reinstatement of the appeal, is to encourage the overthrow of the rule. The motion is less meritorious because of the fact that notice of the appellee's motion to dismiss the appeal was served upon the appellant in sufficient time to have sought and procured permission to complete the record before the action of the court in sustaining said motion to dismiss.

The motion to reinstate is overruled.

Filed June 21, 1894.

No. 16,786.

BOYD ET AL. *v.* VICKREY ET AL.

FRAUDULENT CONVEYANCE.—*From Husband to Wife in Accordance to Contract for Certain Purchase-Money.*—Where, at the time of the conveyance of certain land to his wife, A had other property of the value of one thousand dollars, subject to execution, and was surety for B on a note for $500, B having property subject to execution, sufficient to pay all his indebtedness, the conveyance being made to the wife upon agreement by which certain of the purchase-money was furnished,—the conveyance by A to his wife was not in fraud of creditors.

SAME.—*Insolvency at Time of Conveyance and at Time of Bringing Suit.*—Before a conveyance of real estate will be set aside as fraudulent, it must appear that at the time of the conveyance, as well as at the time of bringing the suit, the debtor did not have sufficient other property subject to execution from which the debt could be made.

From the Henry Circuit Court.

M. E. Forkner, for appellants.

T. B. Redding and *C. N. Mikels*, for appellees.

HOWARD, J.—This was an action by the appellants to set aside a conveyance of real estate as fraudulent. There was a trial by the court and a finding for the appellees; and over a motion for a new trial, judgment was entered upon the finding.

It is contended that the court erred in overruling the motion for a new trial. The reasons given in the motion for a new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to the evidence and contrary to law.

We have read the evidence carefully, and are satisfied that it strongly tends to support the finding of the court.

The evidence tends to show, and we think it fairly does show: That the appellees, Pierce L. Vickrey and his father, John W. Vickrey, were partners in carrying

on the farm of John W. Vickrey; that Pierce L. Vickrey so lived with his father, living on a part of the farm for a great many years after he attained the age of twenty-one, and after his marriage; that his father then thought it but due to his son to make him a deed of forty acres of land, including the house and other buildings which had been occupied by the son; that Pierce L. Vickrey desired to have twenty acres more added to the forty acres, for which he was to pay his father twelve hundred dollars; that Pierce L. Vickrey obtained five hundred of this amount chiefly by selling some horses that he had, and that his wife's father furnished the additional seven hundred, on condition, however, that the deed for all the land was to be placed in the name of his daughter, wife of Pierce L. Vickrey; that the deed for the sixty acres was made to Pierce L. Vickrey by his father, in February, 1887, the consideration being "twelve hundred dollars and love and affection"; that in October, 1888, in conformity with the condition made by the father of Pierce L. Vickrey's wife on his giving her the seven hundred dollars, part purchase-price of the land, the sixty acres were transferred by deed to her; that in February, 1887, Pierce L. Vickrey became surety for his father on a note for five hundred dollars in favor of appellants, being a renewal of a debt for that amount due by John W. Vickrey to appellants, which note was afterwards put in judgment and is the foundation of the present action; that said debt was due in one year from the date of said note, being due February 5, 1888, but was not put in judgment until February, 1892; that at the time said debt became due, and at the time said deed was made transferring said sixty acres from Pierce L. Vickrey to his wife, the said John W. Vickrey, who owed said debt as principal, was abundantly able to pay the same; that at the time of said transfer, and for three

years thereafter, John W. Vickrey owned two hundred and twenty acres of land, worth from sixty to sixty-five dollars an acre, besides from fifteen to twenty-five hundred dollars of personal property, without any mortgage or other lien upon any of his property; that at the time of said transfer Pierce L. Vickrey was not indebted at all, except that he was security on notes for his father, and that his personal property was not worth less than one thousand dollars; that when said loan was made by appellants to John W. Vickrey, and until his assignment in 1891, they believed him abundantly able to pay his debts, as did also his son and himself; that said transfer was made in good faith by Pierce L. Vickrey and his wife; that she had no knowledge of any indebtedness by her husband, and said transfer was not made by her nor by her husband for the purpose of cheating his creditors, but only to carry out the wish of her father, who desired that her home be in her own name, and contributed seven hundred dollars as an advancement to her for that purpose.

It is not necessary to set out more of the evidence to show that the deed by which Minnie Vickrey holds the sixty acres in dispute was not obtained in fraud of any creditors, but was one which might be, and was, honestly given to her by her husband and with the aid of her father's money.

Pierce L. Vickrey was not himself then indebted to any one, and the debt of his father, for which he was security, was one that his father was abundantly able to pay at that time and long afterwards.

It is plain that the appellants are chargeable with laches, or were overconfident, in not collecting their debt when it became due, and that they ought not now to be allowed to take from the wife of the surety the home which she had honestly obtained at a time when

the principal debtor had abundant means to pay their debt.

Before a conveyance of real estate will be set aside as fraudulent, it must appear that at the time of the conveyance, as well as at the time of bringing the suit, the debtor did not have sufficient other property subject to execution from which the debt could be made. *Eiler* v. *Crull*, 112 Ind. 318.

In this case, at the date of the conveyance, the principal debtor had over fifteen thousand dollars' worth of property free from encumbrance and subject to execution, and the surety himself had one thousand dollars' worth, besides the land in question. In addition, the evidence shows that at any time for over two years after the transfer complained of the appellants might have collected their debt from the principal, or real debtor. It would be most inequitable that after thus neglecting their own business they should now be allowed to secure their debt from the surety, by taking from his wife the home which she had acquired without fraud or any knowledge of such indebtedness, and for a valuable consideration. See *Nichols, Shepard & Co.* v. *Burch*, 128 Ind. 324.

The judgment is affirmed.

Filed June 19, 1894.

No. 16,488.

The Midland Railway Company et al. *v.* State, ex rel. Harrison, Treasurer of Boone County.

Appellate Court.—*Jurisdiction.*—*Money Demand.*—Where the amount in controversy on a money demand is less than $3,500, the jurisdiction, on appeal, is in the Appellate Court.

From the Clinton Circuit Court.

W. R. Crawford, *S. O. Bayless* and *C. G. Guenther*, for appellants.

S. M. Ralston and *M. Keefe*, for appellee.

McCabe, J.—This was an action by appellee against the appellants, on a delivery bond. The amount of damages claimed in the complaint was for less than $3,500. The finding and judgment against appellants were for $2,702.46. To reverse this judgment the appeal is brought.

It being an action seeking the recovery of a money judgment only, and the amount in controversy, exclusive of costs, being less than $3,500, exclusive jurisdiction of this appeal is in the Appellate Court. Acts 1893, p. 29, section 1, subd. 3.

The cause is therefore transferred to the Appellate Court.

Filed June 21, 1894.

No. 16,575.

138 280
148 280

138 280
159 4

Boruff v. Hudson.

Practice.—*Overruling Motion to Strike out Parts of Pleading.—When not Reversible Error.*—The overruling of a motion to strike out parts of a complaint is not such error as will work a reversal where it is manifest that the moving party has not been prejudiced by the ruling.

Same.—*Refusing to Strike out Interrogatory.—No Answer Disclosed by Record.*—The defendant can not complain of the overruling of a motion to strike out an interrogatory propounded to him by the plaintiff, where the record does not disclose any answer to the interrogatory.

Specific Performance.—*Contract.—Conveyance of Land.—Statute of Frauds.—Part Performance.—Parties.—Consideration.*—A entered into a written contract with B to convey to him certain land, and subsequently B executed a written contract to convey certain de-

scribed parts of said land to C, in the event of a conveyance to him (B) under the terms of the first mentioned contract. By parol agreement of all the parties to the first two contracts and D, the first named tract (the tract to be conveyed from A to B) was to be conveyed to D, who was to perform the stipulation of said two contracts as to B. A conveyed the said land to D, but D refused to comply with the terms of the contract by which the conveyance to C was to be made. C brought suit against D for specific performance.

Held, that, as between B and C, the two written contracts entered into and formed the basis, as one, of the transactions.

Held, also, that as between B and C, there was a full performance on the part of B and his obligor, A.

Held, also, that the suit for specific performance was not barred by the statute of frauds.

Held, also, that C was a proper party to enforce performance by D.

Held, also, that the receiving of valuable consideration by D from B for assuming the performance, is sufficient consideration to support the promise of D.

From the Lawrence Circuit Court.

N. Crooke and *M. Owen*, for appellant.

HACKNEY, C. J.—The appellee sued the appellant by complaint in two paragraphs, the first demanding specific performance of a contract to convey real estate, and the second demanding damages for a failure to convey said real estate under such contract.

The essential facts alleged were that one Walls procured a written contract for the conveyance to him of a certain tract of land; that subsequently thereto Walls executed a written contract whereby he obligated himself to convey to the appellee certain described parts of said tract, in the event of a conveyance to him under the terms of the first mentioned contract; that by an agreement of the parties to said two contracts and the appellant, said first named tract was to be conveyed to the appellant who was to perform the stipulations of said two contracts as to said Walls; that the conveyance of the

first mentioned tract was made to the appellant, and that he refused to comply with the terms of the contract, by which said conveyance to the appellee was to be made. Issues were formed, and upon a trial and special findings and conclusions of law there was a decree in favor of the appellee, awarding specific performance, and directing a conveyance, by commissioner, of parts of the real estate sought by the complaint.

Overruling a motion to strike out parts of a complaint is not such error as to require a reversal where it is not manifest that the moving party has been prejudiced by the ruling. The appellant was not prejudiced by the ruling upon his motion to strike out parts of the complaint.

Objection is made that the court overruled the appellant's motion to strike out an interrogatory propounded by the appellee and filed with the complaint. The record discloses no answer to this interrogatory, and we perceive no prejudice to the appellant by an interrogatory which he did not answer.

Under the demurrer to the complaint, the appellant insists that the appellee was not a proper party in interest; that no consideration moved from the appellee to Walls or to the appellant to support a promise to convey to him, and that the appellant's contract, not having been in writing, was void under the statute of frauds, both as to the second and fourth subdivisions of section 1, of said statute, R. S. 1881, section 4904; R. S. 1894, section 6629.

The theory of the suit was that Walls, holding a contract of purchase, and having agreed to convey to Hudson, upon the performance of such contract, disposed of the fruits of that contract to Boruff, who, as the consideration therefor, assumed the obligations of Walls

under both such contracts; that Boruff having received and accepted the fruits of such contract could not avoid the consideration therefor.

A promise to pay purchase-money to a third person to the credit of the grantor is not a promise to pay the debt of another within the meaning of the statute of frauds. *Bateman* v. *Butler*, 124 Ind. 223; *Wolke* v. *Fleming*, 103 Ind. 105; *Carter* v. *Zenblin*, 68 Ind. 436; *Crim* v. *Fitch*, 53 Ind. 214; *Haggerty* v. *Johnston*, 48 Ind. 41; *McDill* v. *Gunn*, 43 Ind. 315; *Helms* v. *Kearns*, 40 Ind. 124; *Snyder* v. *Robinson*, 35 Ind. 311; *Woodward* v. *Wilcox*, 27 Ind. 207; *Gwaltney* v. *Wheeler*, 26 Ind. 415.

In *Wolke* v. *Fleming*, *supra*, the contract assumed by parol was a lease in writing, for ten years. It was held that the promise to pay rents, under the contract so assumed, was not within the statute of frauds as an agreement to pay the debt of the lessee. There is no difference in principle between the question so decided and that now under consideration. There it was strongly intimated, and we have no doubt correctly, that, though the promise forming the consideration was within the statute of frauds, if there were a full performance of the contract by which the promisor obtained the fruits of the contract, such part performance would take the promise out of the statute. Here, as between Walls and Boruff, the two written contracts entered into and formed the basis, as one, of the transaction; as between Walls and Boruff there was a full performance on the part of Walls and his obligors, and Boruff received through his parol contract the full fruits of the written contract assigned to him.

By section 5 of the statute of frauds, R. S. 1894, section 6633; R. S. 1881, section 4908, it is provided that in cases of part performance the statute shall not be deemed to abridge the powers of the courts to enforce

specific performance of agreements. This provision was intended to prevent such injustice as that attempted in this case, of taking all the benefits of the contract and then urging the statute as a defense against the burdens forming the consideration of the contract.

If the agreement to convey to Hudson had been, instead, an obligation to convey to Walls, there could be little doubt that the part performance as to Walls would have cut off a resort by Boruff to the statute of frauds, and since we have seen that Hudson, in this respect, stands in the place of Walls, and that he may properly do so, notwithstanding the statute, there is no doubt that Hudson was a proper party. Nor is it a proper inquiry, as between Boruff and Hudson, as to the value and extent of the consideration moving from Hudson to Walls to support the contract of Walls with Hudson assumed by Boruff. That Boruff received value from Walls for the assumption is sufficient consideration to support the promise of Boruff. It was not necessary that the consideration should have passed from Hudson to Boruff.

It is suggested by appellant's counsel, that there is a defect of parties defendant in that those who contracted to convey to Walls, and instead conveyed to Boruff, pursuant to the verbal agreement between Boruff and Walls, should have been parties. No argument or authority is cited in support of the suggestion, and no reason appears to us to have made it important to take the persons mentioned before the court. They had no interest whatever in the result of the litigation, and their presence was not necessary to the title sought by the appellee.

Upon the motion for a new trial, the question is made that the evidence failed to establish title in the appellant's grantors. The appellee was entitled to a marketable title under the contract with Walls, so assumed by

the appellant, and the burden of supplying it rested upon the appellant. Just how it became essential to the appellee's recovery that he should show that the appellant possessed a marketable title, is not suggested, and does not occur to us. That the appellant obtained a conveyance for the tract, was the condition upon which he was to convey to Hudson. There is no breach of this condition claimed by the appellant.

There are other alleged errors discussed by the appellant, but they are necessarily included within the questions already considered.

The appellee has not aided us by any brief or argument of the questions presented by the record.

No error appearing in the record, the judgment of the circuit court is affirmed.

Filed June 5, 1894.

No. 16,791.

138 285
144 205

Urmston *v.* Evans.

Jurisdiction. — *Mortgage.* — *Injunction.* — *Subject-Matter.* — *Parties.* — *Nonresidents.*—U, holding purchase-money notes secured by mortgage upon land in Tipton county, in payment for a lot in the same county assigned them to E, relying upon the latter's false representation that the lot was unincumbered. Afterwards U was compelled to pay a lien existing upon the lot at the time of his purchase. E assigned the notes to B as collateral security for a debt, and C held the notes for B. An action by U seeking to recover so much of the notes as covered the amount of the lien paid, to restrain any disposition of them and to restrain P, the owner of the land, from paying the notes until the rights of the parties were adjusted, was commenced in the Tipton Circuit Court, to which E, B, C, and the land owner P were made parties. The latter was a resident of Tipton county, and all the others nonresidents.

Held, that as P was a necessary party, and as U had an interest in the

mortgaged land for that part of the purchase price of the land equal to the lien paid by him on the lot, the Tipton Circuit Court had jurisdiction both of the parties and of the subject-matter.

From the Tipton Circuit Court.

G. H. Gifford and *J. M. Fippen*, for appellant.
L. M. Harvey, for appellees.

HOWARD, J.—On the 18th day of August, 1887, the appellant sold to Joseph McNew certain real estate in Tipton county, taking in payment certain promissory notes secured by mortgage upon said real estate.

On the 28th day of September, 1888, the appellant purchased of the appellee, William A. Evans, a lot in the city of Tipton, in said county, for which the appellant assigned to said Evans said notes and mortgage.

It is alleged in the complaint, by appellant, that by the terms of the transfer of said mortgage and notes, the said Evans was to make to the appellant a good and approved title to said property in the city of Tipton, free from any incumbrance; that Evans falsely and fraudulently represented to the appellant that said property was free from any and all kinds of liens; that appellant, relying upon said appellee's statements, and believing them to be true, accepted said deed to said property, and that had it not been for said false and fraudulent statements of said appellee, and appellant's reliance upon the same, appellant would not have purchased said property without an examination of the records of the county for liens.

It is further alleged to be the truth that there was a mortgage upon said lot, amounting to $287.50, and that said appellee's statement was false and fraudulent and made for the purpose of cheating and defrauding appellant; that as to so much of said mortgage and notes there was an entire want of consideration for their assignment;

that appellant was obliged to, and did, pay said lien on said property; that said appellee Evans is wholly insolvent, and has been so ever since appellant was so compelled to pay off said lien; that appellant had no knowledge of said lien at the time he transferred said notes and mortgage, nor for many months thereafter; that on the 28th day of September, 1888, the appellee Evans assigned said notes to his codefendant, Carrie T. Brooke, of Knoxville, Tennessee, as collateral security; that since the said time, to wit, the 18th day of August, 1887, Rudolph Pfleuger, codefendant of the said Evans, has purchased the land described in said mortgage and assumed the payment of said indebtedness; that Albert Cole, also codefendant of said Evans, has and holds possession of said notes for said Carrie T. Brooke; that the remaining codefendants claim some interest in said notes, to the appellant unknown.

The prayer is that Carrie T. Brooke and Albert Cole, after the payment of their debt out of said notes, be required to turn over, out of the remainder, a sufficient amount to cover the amount of said liens on the property for which the said notes were erroneously assigned; that William A. Evans be enjoined from transferring, or attempting to transfer, the amount of said mortgage and notes which appellant has been obliged to pay and for which there was no consideration for said assignment; that said Pfleuger be ordered to pay said amount of said mortgage to the appellant when the same becomes due; that the assignment of said amount of said mortgage be set aside and annulled and be left in the name of appellant, and that the remainder of the defendants be forever restrained from claiming any right, title, or interest in said notes or mortgage; that said Rudolph Pfleuger be restrained from paying off any more of said notes until the final hearing of the cause, and that said Evans, Cole

and Brooke be restrained from assigning, disposing of, or turning over, or in any way interfering with said notes until said final hearing and the further order of the court.

On the filing of the proper affidavit and bond, the restraining order was issued, as prayed for.

The defendants, except Pfleuger, each entered a special appearance and filed separate pleas in abatement to the jurisdiction of the Tipton Circuit Court. It was alleged in these pleas that all the defendants, except Rudolph Pfleuger, were nonresidents of the county of Tipton; that said Pfleuger is not a necessary or a proper party, and hence the court had no jurisdiction of the subject-matter nor of the parties.

A separate demurrer was filed to each of the pleas in abatement, and was overruled. The appellant then filed a reply to the pleas in abatement, stating the cause of action much the same as stated in the complaint. It was then agreed that the issues be formed as to the defendant Evans, and that all the other defendants abide the result thereof.

Thereupon the defendant Evans filed his demurrer to the reply, which demurrer was sustained by the court.

It is assigned as error that the court overruled the demurrer to the plea in abatement and sustained the demurrer to the reply; and the only question to be decided is whether the court had jurisdiction of the subject-matter of the action and of the persons of the defendants.

Rudolph Pfleuger assumed the payment of the debt represented by the notes given to appellant for the purchase-price of land in Tipton county, amounting to $2,800. These notes were in part obtained from appellant by the fraud of the defendant Evans, the appellee, who is insolvent. Evans assigned them to the defendant Brooke, as collateral security for a loan of $1,200, the

defendant Cole holding the notes for the defendant Brooke. Appellant sought to recover so much of the notes as covered the amount fraudulently obtained from him by Evans, and to require Pfleuger to pay to appellant that amount directly.

In such a precarious condition of the notes representing the debt due appellant, it would seem that the only adequate means of securing that debt was an order restraining any disposition of the notes or any payment upon them, until the court should establish the respective rights of the parties in them. Pfleuger was therefore a necessary party defendant. There is no question that the court had jurisdiction of him. But, by section 314, R. S. 1894 (section 312, R. S. 1881), when there are several defendants, and the court obtains jurisdiction over one of them, it has jurisdiction over all the others residing within the State, by issuing and serving process on them. *Lindley* v. *Kregelo*, 121 Ind. 176.

It is also apparent from the complaint, that the appellant had an interest in the mortgaged land in Tipton county, being for that part of the purchase-price of the land equal to the amount of the lien on the town lot bought by him in the city of Tipton, and which he was obliged to pay by the fraud of Evans. As to this amount he remained a mortgagee of the Tipton county land. This was an interest in real estate which he could recover only in the county in which the land was situate (section 308, R. S. 1894; section 307, R. S. 1881).

The Tipton Circuit Court had, therefore, jurisdiction both of the subject-matter of the action and of the persons of the defendants.

The judgment is reversed, with directions to sustain the demurrers to the pleas in abatement, and for further proceedings.

Filed June 6, 1894.

138 290
148 466
138 290
1153 119

No. 16,777.

MEADOR *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

ASSIGNMENT OF ERROR.—*Negligence.—Instruction to Find for Party.—Practice.*—Where, in an action for negligence, the trial court instructs the jury to find a verdict for the defendant, an assignment of error, on appeal, that "the court erred in taking the case from the jury," is not a proper one, and presents no question.

MASTER AND SERVANT.—*Negligence.—Defective Ladder.—Injury to Servant.—Liability of Master.*—Where an employe, whose duties require him to use a ladder, discovers that the ladder is defective and dangerous, and notifies the master, who promises to furnish another, but before doing so the employe, in using the defective ladder, is injured, the master is not liable, although the service in which the ladder was used was of a kind which could not be postponed.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

F. E. Baker and *C. W. Miller*, for appellee.

DAILEY, J.—This was an action by the appellant against the appellee for damages for personal injuries, stated in a complaint in one paragraph.

The allegations therein summarized are as follows: The appellant was an employe of the defendant, and a part of his duty was to light and extinguish lamps at a street crossing, the lamps being put on top of a post eight or eight and one-half feet high, requiring a ladder to be used by appellant to perform that duty; that appellee furnished the ladder; that it got out of repair; that Christian Jacobson was the agent of appellee, who was entrusted with the duty of furnishing for appellee all ladders and other appliances, which were made in appellee's carpenter shop at Elkhart station; that appellant notified said Jacobson that said ladder was becoming weakened and out of repair, and was not suitable for the

use which appellant was required to make of it; that said Jacobson told the appellant the ladder would be safe until he, Jacobson, could furnish a new one, and he would furnish a new one very soon; that appellant's other duties were performed without the use of the ladder, and were at a different place; that appellant relied upon the statement of Jacobson that said new ladder would be furnished at the place the ladder was to be used; that when he went to use the ladder he found that no new ladder had been furnished according to promise; that the service in which the ladder was used was of a kind which could not be postponed; that he carefully examined the old ladder and could not see any new evidence of its giving away, and in the belief that said Jacobson knew whether it was safe to use, when he told appellant to continue to use it until a new one was furnished, and relying upon said Jacobson's directions and knowledge, he carefully, and without any negligence, used the ladder again, upon which use it gave away and threw him upon the ground and injured him; that he would not have used said ladder but for the directions of said Jacobson and his promise to supply a new one; that the defective condition of said ladder was wholly because of the negligence of the appellee, and not contributed to by the appellant.

The appellee demurred to the complaint and the demurrer was overruled. The case was then put at issue by a general denial.

At the trial the court instructed the jury as follows: "Gentlemen of the jury, the court instructs you to find a verdict for the defendant. J. M. Van Fleet, Judge."

To the giving of this instruction the appellant, at the time, excepted. The jury obeyed the instruction, and returned their verdict for the defendant. Final judgment was rendered upon the verdict. Appellant filed a mo-

tion for a new trial, which was overruled and exceptions taken.

The appellant assigns two errors as follows:

1st. The court erred in overruling appellant's motion for a new trial.

2d. The court erred in taking the case from the jury.

The second specification is not a proper assignment of error and presents no question for our consideration. The real question to be considered is: Did the court err in overruling appellant's motion for a new trial?

It appears that the appellant was a man of mature years, and of average mental and physical capacity. It was his duty, under his employment, to light and extinguish lamps placed on posts, the distance from the ground to the burner being from eight to eight and one-half feet. In doing this he used a ladder, furnished for the purpose, about five feet long, containing five steps including the top piece, four steps being nailed between and to the sides, and the last step on top of the uprights or side pieces. By setting the ladder against the post appellant would climb only upon the third step to bring his head even with or above the lamp. The defects alleged to have existed in the ladder, at and before the accident and injury complained of, consisted in the steps not being nailed in tight enough at the sides. On the morning when the injury occurred, if the nails were partially withdrawn from the boards, that was open to observation and could have been readily seen. Such must have been the condition of the ladder at the time, for it "fell apart." If a hammer or hatchet was not convenient, a stone or a brick would have remedied the defect. No contrivance could be simpler in its construction than this five-foot ladder,—not even a hoe, an ax, or a spade. Appellant had at least equal knowledge

with the company, as to the nature and condition of the ladder.

The right of the plaintiff to maintain this action is founded upon the negligence of the defendant in not furnishing a proper ladder for the use of the plaintiff in the work he was engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient, properly constructed, and safe machinery, or other materials and appliances to be used in the course of his employment and necessary for the service. As a general rule, it may be assumed that the master, who employs a servant, has a better and more comprehensive knowledge of the machinery and materials to be used than the employe, who has claims for his protection against the use of defective, inadequate or improper machinery, materials, or appliances, while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases; where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work he is required to perform, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

In considering the application of this rule, due regard must be had to the limited knowledge of the employe, to the machinery and structure on which it is employed, also to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise.

In cases in which persons are engaged in a dangerous service, it has been many times held that, if the machinery was defective and the plaintiff had knowledge of it,

and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, and not having waived the objection, was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover; but, in such case, greater care will be required of him than if he had not known of the defect.

In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished, the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employe has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, can not be said to have a claim against his employer for negligence, if, in using an utensil which he knows to be defective, he is accidentally injured.

In such case it does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully understood that the spade, the ax, the hoe, or the ladder, the instrument which he used, was not perfect, and if he was thereby injured it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case, does not render the master responsible if an accident occurs. A rule imposing a

liability under such circumstances would be far reaching in its consequences, and would extend the rule of *respondeat superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff, in the case at bar, was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery. *Marsh* v. *Chickering*, 101 N. Y. 396. Of this case it is said, in citing and approving it, in *Jenney Electric Light and Power Co.* v. *Murphy*, 115 Ind. 566 (570): "In *Marsh* v. *Chickering*, *supra*, which grew out of a claim for damages resulting from the slipping of a ladder, a judgment of the lower court for the plaintiff was reversed, notwithstanding it appeared that the plaintiff had notified the employer of the defective condition of the ladder, and the latter had promised to have it repaired. The case is not distinguishable in principle from the one now under review." The case of *Corcoran* v. *Milwaukee Gas Light Co.*, 51 N. W. Rep. 328, is quite similar in its facts. In it the plaintiff notified the defendant that the ladder was not safe and secure, the defendant promised to provide a safe ladder, the plaintiff relied on such promise, the defendant failed to furnish a safe ladder, and ordered the plaintiff to use the old one on the occasion of his injury. It was to be used upon an oily floor, and was unsuitable and unsafe for the purpose by reason of not having spikes at the bottom. The court said: "The natural, if not the inevitable, result of such an attempt, under such circumstances, is

too obvious not to be anticipated by the exercise of ordinary care on the part of a man of plaintiff's admitted experience. It is unlike the exposure to some concealed or unforeseen danger, or to a defect or danger which the injured party could not be required or expected to remedy." Undoubtedly the result of climbing a five foot step ladder, with the cleats gone from under the steps, which they supported, and the nails loose in the side pieces, is just as obvious as going upon a ladder with no spikes in the bottom, placed upon an oily floor. The court further said: "Besides, as indicated in *Marsh* v. *Chickering*, *supra*, the rule (that the plaintiff might rely on the promise of the defendant to furnish a new ladder), is hardly applicable to a case like the one at bar." In both the cases from which we have quoted, the employe was ordered by his foreman to use the defective ladder on the occasion of the injury; while in this case, on the occasion of the accident, appellant was left to decide the time and manner in which he would use the ladder or whether he would use it at all. The conclusion we have reached renders it unnecessary that we should consider the questions raised by the appellant concerning the rejection of certain offered testimony tending to show notice to the company of the defective condition of the ladder; that a notice was posted upon the door of the carpenter shop at Elkhart, instructing persons to whom they should go for new work and repairs; also, that a new ladder was made by Jacobson and brought to the place of the accident on the same day after the injury. We are of the opinion that there is no available error in the record.

The judgment is, therefore, affirmed.

Filed June 6, 1894.

No. 16,347.

138 297
140 291

138 297
146 539

138 297
148 12

138 297
155 814

The Silver Creek Cement Corporation *v.* The Union Lime and Cement Company.

Real Estate.—*Description.—Quantity.—Metes and Bounds.*—It is only in the absence of monuments, courses and distances that the quantity of land named in a deed will govern.

Same.—*Description.—Metes and Bounds.—Adverse Possession.—Ejectment.*—Where the evidence does not expressly show any adverse possession of lands beyond the metes and bounds fixed in the deed, the metes and bounds must control in a possessory action.

Ejectment.—*Recovery.—Issues Formed by General Denial.—Relative Strength of Title.*—Where the complaint in an action for ejectment is answered only by general denial, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the alleged weakness of his adversary's title.

Title.—*Color of Title.—Adverse Possession.*—Where there is no color of title there can be no constructive possession, and consequently no ripening of title into ownership.

From the Floyd Circuit Court.

S. S. Johnson and *R. W. McBride*, for appellant.

G. H. D. Gibson, *H. A. Burtt* and *J. E. Taggart*, for appellee.

Howard, J.—This was an action by appellant for the recovery of the possession of real estate. The appellee answered in general denial, and the cause was submitted to the court for trial. There was a finding and judgment for the appellee. It is assigned as error that the court overruled appellant's motion for a new trial.

The reasons given in the motion for a new trial were that the finding and decision were not sustained by sufficient evidence, and that they were contrary to law.

In an action for the possession of real estate, when, as in this case, the defendant, by a general averment, simply denies the plaintiff's claim, it is necessary for the plaintiff to recover, if at all, upon the strength of his own title, and not upon the alleged weakness of his ad-

versary's title. *Deputy* v. *Mooney*, 97 Ind. 463; *Roots* v. *Beck*, 109 Ind. 472. We shall therefore not consider what is said in the record or in argument as to the title, or want of title, in appellee.

On June 15, 1836, John McClintock conveyed to Aaron Wooten a tract of land in Clark county, described by metes and bounds, and said to contain ninety-six acres. Appellant's claim to the land in controversy is based upon a deed made November 14th, 1838, by Aaron Wooten to John Gilmore for a part of the tract so conveyed to Wooten by McClintock. The description of this land conveyed by Wooten to Gilmore is also by metes and bounds, and to the description so made are added the words "containing seventy-eight acres, two roods and four poles." Two deeds were afterwards made for this land so deeded by Wooten to Gilmore, the last being June 1st, 1883, to appellant. In each of these last deeds the land is described in like manner by metes and bounds, stating also the number of acres but adding the words "more or less."

It is now claimed that the land included in the metes and bounds does not equal in quantity the seventy-eight acres and a fraction stated in the deeds, and appellant seeks to recover the difference from appellee, who is in possession of the remainder of the original ninety-six acres conveyed by McClintock to Wooten.

The description by metes and bounds in this case is very detailed and definite, naming the point of beginning, the monuments, the courses and the distances. The monuments have all been located, and the lines and corners found as set out in the deed to appellant.

It is well settled that recitals in a deed as to the quantity of land conveyed, whether of acres, rods or feet, are not necessarily conclusive. In describing a tract of land, monuments, if named, control, and after monuments

come courses and distances. It is only in the absence of monuments, courses and distances, that the quantity of land named in the deed will govern. *Allen* v. *Kersey*, 104 Ind. 1, and authorities there cited; 2 Am. and Eng. Enc. of Law, 499.

Under the deed in this case, therefore, appellant can claim only the land embraced in the description by metes and bounds.

But counsel also contend that the evidence shows that appellant had possession of the land, with claim of right, for over twenty years before appellee took forcible possession of the same. We have carefully considered the evidence adduced on this point, and can find nothing in it sufficient to support the contention of counsel. To acquire a right by occupancy, there must be an actual enjoyment of the use of the premises.

In this case, as late as June, 1883, when appellant received the deed now claimed to include the land in controversy, no question seems to have been made as to the correctness of the description by metes and bounds, as given in that deed.

The witnesses relied upon to show possession of the disputed land, state, in substance, that the grantors put their grantees in possession of the land conveyed. Nor is there any sufficient evidence that appellant or any of its grantors ever claimed any boundary other than as described in the deed to appellant.

This being so, there could be no adverse possession on the part of the appellant; for if one is ignorant of the location of a boundary, and intends to claim only to the true line, wherever that may be, his possession, even if actual, is not adverse, and will not ripen into ownership. 1 Am. and Eng. Encyc. of Law, 249; *Schraeder, etc.*, v. *Packer*, 129 U. S. 688; *Heinz* v. *Cramer*, 51 N. W. Rep. 173; *Finch* v. *Ullmann*, 16 S. W. Rep. 863.

Moreover, there is not in this case even satisfactory evidence that any definite boundary was located, fenced, or occupied by appellant. And if the possession claimed was constructive only, still, from what we have said of the descriptive words, as contained in appellant's deed, we do not think there was color of title; and without color of title there could be no constructive possession, nor any ripening of title into ownership. 1 Am. and Eng. Encyc. of Law, 253, 292.

And while there is some vague testimony as to points and limits believed by the witnesses to be within appellant's land, yet we can not, for this uncertainty, if it should be such, reverse the judgment on the weight of the evidence. The witnesses were all before the trial court, and that court was much better able than this to judge of the force and effect of their testimony. *Skinker* v. *Haagsma*, 99 Mo. 208.

The real controversy in the case is due to the conflict between the description in the deed by metes and bounds and the number of acres stated as contained within those limits. The mistake in calculating the number of acres was one easy to make. The metes and bounds, on the other hand, are fixed, definite and visible. These metes and bounds must control, since the evidence does not expressly show any adverse possession of lands beyond the boundaries so fixed.

The judgment is affirmed.

Filed Nov. 8, 1893.

On Petition for a Rehearing.

Howard, J.—In the earnest and courteous petition and brief for a rehearing, it is contended that the judgment should be reversed on the evidence. We have again carefully read the evidence as set out in the record, and while it might seem, as counsel contend, that the

preponderance was in favor of appellant, yet there is evidence, and that pertinent to the issues, and sufficient to sustain the judgment in favor of the appellee.

This evidence, too, was sufficient to satisfy two trial courts, there having been a new trial as of right and a change of venue, that the appellant had not made out its claim to the property in dispute under any view of the issues. We can not weigh the evidence thus passed upon in those trials, nor disturb the judgment based upon it.

The petition is overruled.

Filed June 8, 1894.

No. 16,252.

City of Columbus v. Strassner.

138 301
150 518

138 301
167 527

138 301
171 701

Change of Venue.—*Sufficiency of Affidavit.—Court Rules.*—An affidavit for a change of venue, made after the time limited by court rule, is not sufficient where it states no legal excuse for not making the application within the time fixed by the rules of the court.

Physician and Patient.—*Physician's Bill for Treatment of Wife.—Liability for.—Assumption and Payment by Wife.*—While a physician's bill for treating the wife is generally the debt of the husband, yet the wife may treat it as her own debt, and pay it.

Same.—*Skillfulness of Physician a Question of Fact.—Presumption.—Instruction to Jury.*—The law raises no presumptions as to the skillfulness of a physician in regular practice, nor that the patient will obey the directions of the physician. Such presumptions are inferences of fact to be drawn by the jury from the evidence or from a given state of facts, and it is error for the court to instruct the jury as to what inferences they shall draw.

Instructions to Jury.—*When Properly in the Record.—Bill of Exceptions.*—Where the words, "given and excepted to by the defendant, February 20, 1891," are written after each instruction given by the court of its own motion, which is signed by the judge trying the cause, and all these instructions, as well as all others given and refused, are embraced in a proper bill of exceptions which was regularly filed, as shown by the record entry, the instructions and the exceptions indorsed thereon are properly in the record.

From the Decatur Circuit Court.

C. J. Kollmeyer, for appellant.
F. E. Gavin and *J. C. Orr*, for appellee.

COFFEY, C. J.—This was an action by the appellee against the appellant, to recover damages sustained by the appellee on account of a personal injury suffered by reason of a defective and unsafe sidewalk. No question is made as to the sufficiency of the pleadings in the cause. A trial by a jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of error calls in question the correctness of the ruling of the circuit court in overruling the appellant's motion for a new trial.

It is contended by the appellant that the circuit court erred:

First. In overruling an application for a change of venue.

Second. In admitting improper and incompetent evidence to go to the jury on behalf of the appellee.

Third. In its instructions to the jury.

The parties entered into an agreement to the effect that, if the appellant filed an affidavit sufficient to entitle it to a change of venue, the cause should be sent to the Shelby Circuit Court. The affidavit was not filed until it was too late, under the rules of the court, and the application for a change of venue was refused for that reason. It is contended by the appellant that, by reason of the agreement, the court erred in this ruling, but we think otherwise. The affidavit was not sufficient to entitle the appellant to a change of venue, for the reason that it failed to state any legal excuse for a failure to make the application within the time fixed by the rules of the court.

The court did not err in admitting the evidence of which the appellant complains. While it is generally true that a physician's bill for treating the wife is the debt of the husband, we perceive no reason why she may not treat it as her own debt, and pay it. If the appellant was liable at all in this case it was liable for the medical bill rendered necessary by the appellee's injuries. It can make no difference to it whether it pay such bill to the wife or to the husband.

If the wife paid it out of her own separate means, the husband can not recover it, so the appellant is in no danger of being compelled to pay it more than once.

The appellant contends that the court erred in giving to the jury instructions numbered four, five, six, twenty-five, twenty-eight, and twenty-nine.

We think all the instructions of which complaint is made, except twenty-eight and twenty-nine, state the law correctly. Twenty-nine states the law too favorably to the appellant.

Instruction twenty-eight is as follows:

"28. If the plaintiff called a physician regularly engaged in the practice of his profession, to treat her injuries (if she was injured), the presumption would be that he was a reasonably skillful one, and that she followed his instructions in her conduct and use of her limb; and in such case she should not be held responsible for any mistakes he may have made in the treatment of her case; nor should her damages, if you find that she is entitled to recover damages, be reduced thereby."

In giving this instruction to the jury, we think the circuit court erred.

There was a controversy between the appellant and the appellee as to whether the latter had exercised ordinary care in the selection of a physican to treat her injuries. There was much evidence introduced by the appellant

tending to show that the physician mistook the nature of the appellee's injuries, and, as a consequence, did not properly treat her. Under these circumstances, we think the question as to whether the physician was skillful and the question as to whether the appellee followed his directions should have been left to the jury.

As to whether a physician in regular practice is to be presumed skillful or otherwise, we think must necessarily depend on circumstances. If he should lose all his patients, the presumption, perhaps, would arise that he was not skillful; while, on the other hand, if his practice should be attended with success, the presumption of skill would arise. From the fact that a physician was in regular practice, if nothing to the contrary appeared, the public would, perhaps, have the right to presume the further fact that he was skillful. So, for the reason that the patient would be likely to incur additional pain by disregarding the instructions and directions of his physician, it is fair to presume, as a fact, that he will obey such instructions and directions. But the law indulges no presumptions upon the subject. They are presumptions of fact and not of law.

It is the province of the jury to draw presumptions of fact from the evidence or from a given state of facts, and it is error for the court to instruct it as to what inferences they shall draw.

In the case of *Union Mut. Life Ins. Co.* v. *Buchanan*, 100 Ind. 63, it was said by this court: "It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence. Instructions should state legal principles, not declare inferences of fact. They may be declarations of law, but not commentaries upon evidence. The law is for the court; the facts are for the jury. Inferences from proved facts must be made by the triors of the issues of fact."

In the same opinion, the court quoted with approval, from Thompson Charge to Juries, the following: "It is, therefore, merely a repetition of what has already been said, to say that it is for the jury, and not for the judge, to draw presumptions of fact; and that, for the judge to tell the jury what presumptions of fact they ought to draw from a given fact or series of facts, is a usurpation of their functions."

Upon this subject our cases seem to be uniform. *Woollen* v. *Whitacre*, 91 Ind. 502; *Garfield* v. *State*, 74 Ind. 60; *Millner* v. *Eglin*, 64 Ind. 197; *Newman* v. *Hazelrigg*, 96 Ind. 73; *Finch* v. *Bergins*, 89 Ind. 360.

Upon an examination of the entire record, we can not say that this instruction did not injuriously affect the appellant.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed April 25, 1893.

On Petition for a Rehearing.

Coffey, J.—In considering the petition for a rehearing in this case we deem it unnecessary to say anything in addition to what has already been said except what it may be necessary to say in relation to the petitioner's objection that the instructions of the trial court to the jury are not properly in the record.

Under the practice in this State there are three modes by which instructions may be made part of the record of a cause, viz:

First. By order of the court.

Second. By special exceptions written upon the margin, or following each instruction and signed by the judge.

Third. By a general bill of exceptions. *Ohio, etc., R. W. Co.* v. *Dunn*, 138 Ind. 18.

In this case the words "given and excepted to by defendant, February 20, 1891," were written after each instruction given by the court on its own motion, after which follows the signature of the judge trying the cause. All of these instructions, as well as all other instructions given and refused, are embraced in a proper bill of exceptions which was regularly filed as shown by the record entry.

This, we think, was sufficient to bring the instructions, together with the exceptions indorsed thereon, into the record. The filing of the bill of exceptions containing these instructions and exceptions was a substantial compliance with the statute requiring the instructions to be filed where the exceptions are taken in the manner above indicated. We have not deemed it necessary to inquire whether the evidence is properly brought into the record, for the reason that instruction twenty-eight, given by the court to the jury, is erroneous under any supposable state of the evidence. By it the court assumes to tell the jury what presumptions of fact they are required to draw from the existence of other given facts.

This was, we think, clearly an assumption by the court of the functions of the jury, and was, for that reason, erroneous under any state of facts that might have been proven under the issues in the case.

The petition for a rehearing is overruled.

Filed June 7, 1894.

No. 16,872.

Haus *v.* The Jeffersonville, Madison and Indianapolis Railroad Company et al.

138 307
155 25

Judicial Notice.—*Obstruction of Highway.—Double Tracked Railroad on Twenty Foot Alley.*—The court judicially knows that the appropriation of an alley only twenty feet wide to the use of a double-tracked railroad will greatly interfere with, prevent, and obstruct the safe and unobstructed passage of vehicles upon such alley.

Pleading.—*Complaint, Sufficiency of Facts.—Theory.—Railroad.—Damages.—Obstruction of Alley.*—Where the theory of a complaint against a railroad company for damages was that the company had negligently and unnecessarily increased the obstruction of an alley by laying its two tracks thereon six feet apart instead of twelve as required by ordinance, and had further and unnecessarily, and negligently obstructed the alley by running cars over such tracks at a greater rate of speed than that provided by the city ordinance, but no facts are stated by which such rate of speed either aggravated or increased the obstruction of the alley, nor that the prohibited rate of speed injured the appellant, and no facts are alleged showing that the difference in space between the tracks did not increase the necessary obstruction of the alley, the complaint did not state facts sufficient to constitute a cause of action.

From the Floyd Circuit Court.

J. H. Stotsenburg and *E. B. Stotsenburg*, for appellant.

S. Stansifer, for appellees.

McCabe, J.—This was an action by appellant against appellees, to recover damages sustained by him in the obstruction of an alley adjoining his property in the city of New Albany.

A demurrer was sustained to the complaint, on which appellees had judgment. This ruling is the only error assigned.

The substance of the complaint is as follows: That the plaintiff is now, and for twenty years past continuously before the commencement of this suit was, the owner in fee-simple of lot 7 in the original plat of the

city of New Albany, Indiana, the same fronting 50 feet on the east side of Upper Third street, between High and Water streets; that when plaintiff purchased said lot, and for 50 years continuously prior thereto, there was in said city a public alley of the uniform width of 20 feet, extending along the south line of said lot for the whole width thereof, being 120 feet in length; that said alley is one of the public highways of said city, having been laid out, platted and dedicated to the public use in the year 1819, by the owner thereof; that subject to the general easement of the public in said highway, and subject to the particular and limited easement hereinafter stated, the plaintiff is, and ever since has been, the owner of the north half of the alley for 120 feet along his lot.

The particular and limited easement referred to is as follows:

Under and by virtue of an ordinance of said city the first named defendant, prior to the year 1870, constructed a single-track railroad over, along, and upon said highway, on the north side of which plaintiff's real estate abuts, the track encroaching on the north half of said alley. Said single track was laid down over the objection and without the consent of plaintiff and other property-holders along said alley; and afterwards, on the 2d day of May, 1870, said defendant first named induced this plaintiff, in consideration of the payment to him of $294.84, to execute and deliver to it a written release, which reads thus: "In consideration of $294.84 in hand paid by the city of New Albany and the Jeffersonville, Madison and Indianapolis Railroad Company, I, the undersigned, Lewis Haus, the owner in fee-simple of the following described real estate, viz., lot No. 7, plat 73, Upper Third street, do hereby release said city and said railroad company from all claims and demands which I now have or ever had, or which my heirs, executors or

administrators shall have to the date hereof, for damages to my said real estate and appurtenances by the granting of the right of way by said city to said company to construct its railroad by, near, alongside of and over my said real estate and appurtenances.

"Witness my hand and seal, this 20th day of May, 1870. LEWIS HAUS."

That said $294.84 was received by this plaintiff, and the said release delivered to and accepted by the said defendant, upon the distinct, mutual understanding and agreement that the said sum so accepted as damages extended only to the 20th day of May, 1870, and no longer; that ever since that date he has had upon said lot a two-story carriage factory, fronting on said Upper Third street and extending along the north side of said lot; that the defendant the Jeffersonville, Madison and Indianapolis Railroad Company, before and ever since said date, has been a railroad coporation, and more than six years before the commencement of this suit, the said defendant leased the said railroad to its codefendant, the Pennsylvania Company a corporation organized under the laws of Pennsylvania, and, when this action was begun, more than six years had elapsed since the said single track was constructed and since said Pennsylvania Company leased said road; that afterwards, on the 6th day of December, 1886, and within six years before the commencement of this suit, the common council of said city passed an ordinance granting to the said Jeffersonville, Madison and Indianapolis Railroad Company the right or privilege to lay down a second main track along said alley, subject, among other restrictions and limitations, viz., that the said second main track should be located and constructed on the south side of the present fixed and existing main track, parallel thereto and twelve feet distant therefrom, and also that the said main or additional track should

be located, constructed and laid down by said defendant in such a manner as not to interfere with the use of said alley by the public, and further, that said track should be so maintained and used, after it was constructed, as not to interfere with the free, safe and unobstructed passage of vehicles upon and over said tracks upon said alley; that the defendants, on the 1st day of January, 1887, and within six years next before the commencement of this action, negligently and unnecessarily obstructed the said alley in the following manner, viz: Although the north half of said alley was, before 1887, taken and used by said defendants, and although they owned real estate south of said alley, instead of obeying the limitations of said ordinance, by putting the additional track twelve feet from the said first track, the said defendants negligently and unnecessarily, and without right, located, constructed and laid down said additional track within six feet of the said first track, so that there has been ever since, and is now, only a space of five feet between the south rail of the first track and the north rail of the second track of the said railroad, and ever since said ordinance was passed the said defendants have kept the said tracks in the same position, so as to completely interfere with and prevent and obstruct the free, safe, and unobstructed passage of vehicles upon and over the said track and upon the said alley.

And ever since the first day of January, 1887, the said defendants have carelessly and negligently used and occupied the said alley as aforesaid in the following manner, viz: That although they were prohibited by the law of said city from running trains of cars within said city and along said alley at a greater rate of speed than five miles an hour, and although they were in like manner prohibited from using the said alley so as to obstruct its use by the plaintiff and the general public, yet they

have, during all hours of the day and night, caused the tracks on the said part of the said alley to be traversed by their own cars (both freight and passenger) and by the cars of other railroad companies drawn by locomotives propelled by steam, at a greater rate of speed than five miles an hour, so that by reason of the said constant and complete obstruction of the said alley in manner and form aforesaid, the plaintiff, on account of the inability of all persons desiring specially to visit or to do business with him to get to his shop, has been entirely deprived of the use of said alley with any kind of vehicle for social or business purposes, to his damage in the sum of $3,000. And by reason of the running of trains of cars of said defendants carelessly and negligently, and in violation of law as above stated, and the destruction of the said alley for alley purposes, the said plaintiff's property has depreciated in value in the sum of $3,000.

Prayer for judgment for $6,000.

From the complaint alone, it is difficult to tell what theory it proceeds upon. But appellant's brief indicates the theory upon which his learned counsel intended to proceed, and that is to recover damages for negligently and unnecessarily obstructing the alley in violation of the terms of the grant of the right of way over and through the alley, and not damages for the appropriation or use, nor for the appropriation of the alley for a second track.

For all such damages as those last mentioned, it is virtually conceded both past and future are covered by the release. *White* v. *Chicago, etc., R. R. Co.*, 122 Ind. 317; *Porter* v. *Midland R. W. Co.*, 125 Ind. 476; *Chicago, etc., R. R. Co.* v. *Eiser*, 127 Ind. 156; *Chicago, etc., R. W. Co.* v. *Hunter*, 128 Ind. 213.

The particular specifications of injury complained of

are that the second track, instead of being laid down in obedience to the limitations of the ordinance requiring the second track to be put twelve feet from the first one, the appellees are charged with negligently and unnecessarily placing the same within six feet of the first, leaving only a space of five feet between the two tracks, "so as to completely interfere with and prevent and obstruct the free, safe, and unobstructed passage of vehicles upon and over * * said alley."

The court judicially knows that the appropriation of an alley only twenty feet wide to the use of a double-tracked railroad will greatly interfere with, prevent and obstruct the safe and unobstructed passage of vehicles upon such alley. To do all that, the company had acquired a right. If, however, placing the tracks six feet instead of twelve feet apart, as required by the ordinance, did not increase the obstruction of the passage of vehicles on the alley, and did not render such passage more unsafe than if the tracks had been twelve feet apart, then appellant had no cause of complaint. For all that appears in the complaint, such difference in the space between the tracks did not increase the necessary obstruction of the alley a particle. If it did not, then the appellant was not injured thereby at all.

The other ground specified is that appellees have run cars over their tracks at a greater rate of speed than five miles an hour, in violation of an ordinance of said city. No fact is stated by which it appears that such rate of speed either aggravated or increased the obstruction of the alley; nor is any fact stated from which it can be inferred that such prohibited rate of speed injured the appellant. We do not consider the question of the statute of limitations.

We are of opinion that the complaint did not state

facts sufficient to constitute a cause of action, and that the court did not err in sustaining the demurrer thereto.

The judgment is affirmed.

Filed June 7, 1894.

No. 16,396.

138 313
148 371
138 313
161 85
138 313
163 365

The Louisville, New Albany and Chicago Railway Company *v.* Kendall.

Pleading.—*Complaint, Sufficiency of.—Recitals.—Personal Injury.—Passenger Pushed from Platform of Car by Railroad Employe, and Run Over by Train.—When Negligence of Company is Shown.*—The complaint in an action for personal injury against a railroad company, alleged substantially, that plaintiff took passage upon defendant's passenger train at the town of S., with a proper ticket, for the town of M.; that upon the arrival of said train at the town of S. plaintiff undertook to, and did, get on the platform of one of the cars of said train to enter the same, but that without fault or negligence on plaintiff's part, but on account of the carelessness and negligence of defendant's agent, plaintiff was, by such employe, pushed from the platform of said car just as the train was starting, and plaintiff, without fault or negligence on his part, fell between the cars of said train onto the railroad track, and was carelessly and negligently caught and run over by defendant's said train, and was mashed, bruised, and mangled; "that all of said injuries were caused by, and the direct result of, said carelessness and negligence of defendant in pushing plaintiff off its train, as aforesaid, and carelessly and negligently running over him * * as aforesaid, and wholly without fault or negligence of plaintiff."

Held, that the complaint is sufficient.

Held, also, that the facts contained in the last clause, in quotations, are not mere recitals, but are direct allegations of material facts.

Bill of Exceptions.—*When not Properly in Record.—Not Included in Clerk's Certificate to Transcript.—Motion to Require Clerk to Amend His Certificate.*—Where what purports to be a bill of exceptions is in the transcript, but the certificate of the clerk to the transcript does not include such bill, and upon motion by the appellant to require the clerk to amend his certificate so as to identify and include

such bill, the clerk made a return to an order requiring him to show cause why he should not so certify, that the long-hand manuscript of the evidence included in said bill was never filed in the lower court; that the bill of exceptions was only in his hands long enough to place the file mark upon the same, and was then taken into, and remained in, the hands of appellant's counsel until after the transcript herein was prepared and certified, and was then attached to the transcript by counsel; that the precipe for the transcript did not require him to include a bill of exceptions, and that he is unable to identify the bill in the transcript as that which was filed in his office, and believes it not to be the same; and affidavits are filed with and made a part of the return, alleging that the longhand manuscript is not the same which was prepared and certified by the stenographer, but, without authority, has been amended since prepared and filed,—the appellate tribunal can not require the clerk to amend his certificate, as doubts exist as to the identity of the bill, and the court must treat the record as not containing such bill.

From the Washington Circuit Court.

E. C. Field, W. S. Kinnan and *J. B. Black*, for appellant.

B. K. Elliott, W. F. Elliott, J. Masterson, J. A. Zaring and *M. B. Hottel*, for appellee.

HACKNEY, J.—The appellee sued the appellant for personal injuries, and with the general verdict in his favor for five thousand dollars, the jury returned answers to special interrogatories from which it appears that the general verdict was necessarily found upon the first of the two paragraphs of complaint. Upon the assignment of error the appellant questions the sufficiency of each of the paragraphs of complaint, but, as it thus appears that the recovery was upon the first paragraph, the appellant did not suffer from the ruling upon the second paragraph, and, in the absence of such finding the fact is presumed. *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261, and cases there cited.

We will confine our inquiry, therefore, to the first paragraph. It alleges that the appellee took passage

upon the appellant's passenger train at the town of Salem, destined for, and with a proper ticket to, the town of Mitchell; "that upon the arrival of said train of defendant at defendant's depot, in the town of Salem, * * plaintiff as a passenger undertook to, and did, get on the platform of one of the cars of said train, to enter the same, but that without fault or neglect on plaintiff's part, on account of the carelessness and negligence of one of defendant's agents, whose name is to plaintiff unknown, he was, by such employe of defendant, pushed from the platform of said train just as the same was starting, and, without any fault or negligence on his part, fell between the cars of said train onto defendant's said railroad tracks, and was carelessly and negligently caught and run over by defendant's said train, and was mashed, bruised, and mangled; * * * that all of said injuries were caused by, and the direct result of, said carelessness and negligence of defendant in pushing plaintiff off its said train, as aforesaid, and carelessly and negligently running over him with its said train, as aforesaid, and wholly without the fault or negligence of plaintiff."

The appellant earnestly contends that this paragraph is deficient in failing to allege expressly, or by facts necessarily sustaining the inference, that the wrongful act was committed by the agent or servant in the course or within the scope of his employment.

It is not questioned that a tortious or negligent act resulting in injury, if done by an agent acting not within the course of his employment, is not the subject of recovery against the principal. Indeed, it is too well settled to admit of question that under such circumstances there can be no recovery. *Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116; *Indianapolis, etc., R. W. Co.* v. *Anthony*, 43 Ind. 183; *Helfrich* v. *Williams*, 84 Ind. 553; *Wabash R. W. Co.* v. *Savage*, 110 Ind. 156; *Louisville*,

etc., *R. W. Co.* v. *Wood*, 113 Ind. 544; Shear. & Redf. Neg., section 63; Wood Master and Servant, section 305.

And it is by these authorities, and many others equally well settled, that the master is liable for a tortious or negligent act of a servant committed while performing his master's service, though not previously authorized nor subsequently ratified by the master, if an injury result therefrom to one to whom the master owes protection from such injury. Of this proposition there is no question by the parties, but the exact question here is, does the complaint make a case within this proposition? It is claimed by the appellant that the only substantive allegation of negligence in the complaint is, that one of the appellant's agents pushed the appellee from the car platform, and that, without indulging unwarranted presumptions in favor of the pleading, this is insufficient to show that the agent was, at the time, performing any service for the master, or that his service had any connection whatever with the management of the train or the car or the passengers of the appellant. On the other hand, the appellee insists that the complaint contains a direct allegation charging the negligence upon the appellant. It is "that all of said injuries were caused by, and were the direct result of, the said carelessness and negligence of defendant in pushing plaintiff off its train, as aforesaid, and in carelessly and negligently running over him with its train, as aforesaid, and wholly without the fault or negligence of plaintiff."

This allegation, the appellant insists, is not a direct averment, but is a mere recital, and, therefore, should be disregarded. To this point are cited *Cummins* v. *City of Seymour*, 79 Ind. 491; *Wabash, etc., R. W. Co.* v. *Johnson*, 96 Ind. 40.

These cases, and many others in this State, hold that material facts essential to the existence of a cause of ac-

tion should be alleged directly and should not be left to be gathered by mere conjecture, and should not be stated by way of mere recital.

In Bliss on Code Pleading, section 318, it is said: "To state or aver that a thing is so or so is very different from speaking of being so or so, or whereas it is so or so. A recital is not a statement, but is introductory to a statement."

In *Jackson School Tp.* v. *Farlow*, 75 Ind. 118, a distinction between direct allegations and mere recitals is clearly made. There the suit was for the breach of a contract under which the plaintiff agreed to teach in one of the schools of the township and was not permitted to do so. He did not allege in his complaint that he had been licensed to teach, and because the contract was made a part of the complaint and it was therein stated that he was "a licensed teacher" it was insisted that the contract supplied the necessary allegation that he had obtained a license. It was held that the recital in the contract, though a part of the complaint, did not comply with the requirement that necessary facts should be pleaded by positive averment.

The following from that case will further illustrate what is meant by recitals in pleading as distinguished from direct averments: "The distinction is well illustrated in the case of *Shafer* v. *Bear River, etc., Co.*, 4 Cal. 294, where it was held that the mere recital of an indebtedness in a mortgage would not so aid a declaration as to make it sufficient. In *Hall* v. *Williams*, 13 Minn. 260, the principle involved in the proposition stated is distinctly declared. It was there said: 'It is contended that the complaint is insufficient, because it does not allege that the defendant Williams was ever appointed deputy collector. In answer to this, it is said that the bond recites the appointment, and as the bond is a part

of the pleading, this recital found in the bond should be treated as an averment of the complaint. This will hardly do. * * The recital may be valuable as evidence of a fact, but it can not be regarded as an averment of the fact.'" See, also, *Crawfordsville, etc., Turnpike Co.* v. *Fletcher*, 104 Ind. 97.

In the two cases cited by the appellant to the point under consideration, the pleadings were insufficient for wholly omitting necessary allegations, and there was no attempt to supply them by recitals, and those parts of the opinions announcing the proposition here urged cite the case of *Jackson School Tp.* v. *Farlow, supra.*

The rule is a correct one, and was there stated as follows: "Material facts essential to the existence of a cause of action should be positively alleged. They should not be left to be gathered from mere conjecture, nor should they be stated by way of recital."

The rule so stated comprehended more than the one question to which it applied.

The allegation here said to be by way of recital is a direct allegation of two essential facts, namely, that the injuries alleged to have been sustained were the direct result of the negligence of the company in pushing the appellee off the train, and of the absence of contributory negligence on the part of the plaintiff. As to the second of the facts so pleaded, it is in the usual form and occurs in that part of the complaint to which it is commonly assigned. It has never been held to be insufficient as consisting of a mere recital, but has often been held sufficient. The criticism of the appellant applies with no greater force to the first of such facts than to the second.

The order in which the several allegations of a complaint are made does not determine the character of the pleading, and where, from the facts alleged, the court

can ascertain with certainty the theory of the action, and, considering all of the allegations, it can fairly be said that there has been a reasonable compliance with the rules of pleading, the pleading should be sustained.

Appellant's learned counsel make this statement in their brief: "Had the appellee charged that the defendant negligently pushed him off of the platform, as against a demurrer, the pleading would be good."

It is so held in *Wabash R. W. Co.* v. *Savage*, *supra*, and, it is our opinion, that the complaint does fairly allege, in the language last quoted from it, that the defendant's negligence in pushing the plaintiff from the car caused the injuries complained of, and considering that allegation in connection with the former allegation that the act was committed by the appellant's agent, there is no room to doubt that it may be fairly understood from the complaint, that recovery is sought for the company's wrong inflicted by its agent in pushing the plaintiff from the car. As the company could only act by and through its agents, and could inflict injury only by the act or negligence of its servants, the complaint would certainly be sufficient as against a demurrer.

The case of *Helfrich* v. *Williams*, *supra*, is not in conflict with any view we have taken of the complaint in the case before us. It was alleged in the complaint in that case, that the injury complained of was sustained through the negligence of "a certain employe of the defendants, not engaged in the same line of employment as the plaintiff." It was held that "it must be an act of negligence committed while engaged in the service and in some way connected with the doing of the service;" and that the act complained of was, under the allegations of the complaint, not the act of the master, but of one who, in some employment disconnected from the wrongful act, was a servant of the common master.

Other questions are discussed, but as they depend upon the bill of exceptions, we can not consider them, for the reason that the record does not properly present said bill. In the transcript is what purports to be a bill of exceptions, but the certificate of the clerk to the transcript does not include said bill, and we have no evidence that it is the bill filed in the case.

A motion by the appellant has been made to require the clerk to amend his certificate so as to identify and include said bill, but, after issuing an order requiring the clerk to show cause why he should not so certify, he has made a return showing that the longhand manuscript of the evidence included in said bill was never filed in the lower court; that the bill of exceptions was only in his hands long enough to place the file mark upon the same, and was taken into and remained in the hands of appellant's counsel until after the transcript herein was prepared and certified, and was then attached to the transcript by counsel; that the precipe for said transcript did not require him to include a bill of exceptions, and that he is unable to identify the bill in the transcript as that which was filed in his office, and believes it not to be the same.

Affidavits are filed with and made a part of the return of the clerk from which it appears further that said longhand manuscript of the evidence included in said bill of exceptions was never filed in the court below nor in the office of said clerk; that the said longhand manuscript is not the same which was prepared and certified by the stenographer, but has been amended since prepared and certified, and that without authority, by additions, interlineations, modifications, and the striking out of evidence given and certified, and by including documentary evidence; that originally there was no order-book entry of the filing of the bill of exceptions, and that upon pro-

ceedings in the lower court, an entry was made *nunc pro tunc* of the filing of a bill of exceptions, but that the court refused to identify the bill now in the transcript as the bill so filed. Upon the return so made, we have overruled the appellant's motion to require the clerk's certificate to be amended. If the certificate identified and included the bill appearing in the transcript, we could entertain no question as to the correctness of the bill, but should leave the question for the consideration of the trial court. As the certificate does not include the bill, as doubts exist as to the identity of the bill found in the transcript, and as the appellant had the power to settle the question of identity in the lower court, even by *nunc pro tunc* entries, we can not require the certificate to be amended, and thereby determine an issue which should have been settled before the case came into this court.

Finding no error in the record, the judgment of the circuit court is affirmed.

Filed Feb. 16, 1894; petition for a rehearing overruled June 5, 1894.

No. 16,536.

138 321
140 158

138 321
160 347

138 321
165 192

McClelland, Trustee, *v.* The State, ex rel. Speer.

Township Trustee.—*Insurer of Public Funds.—Deposit.—Failure of Bank.*—A township trustee is an insurer of the safety of the public funds in his charge, and is bound to account for money lost by the failure of a bank in which the funds are deposited, even though he be without fault.

Same.—*Statute.—Public and Private.—For Relief of Trustee.—Constitutional Law.*—An act of the Legislature providing for the reimburse-

ment by a township of a trustee who lost public funds by the failure of a bank, and which is not declared to be a private statute, is, under section 27, article 4 of the constitution, a public law.

SAME.—*Taxation.—Private Use.*—A public statute which is intended to, and in effect does, so tax an individual as to take private property for private use is not valid.

SAME.—*Taxation for Relief of Trustee.—Reimbursement of Fund by Trustee.*—Where a township trustee makes up from his private means school funds of the township lost by the failure of a bank in which they were deposited, he has no legal right to a return of the money so paid by him, and a statute for his relief directing his successor in the trust to repay such money, to do which it is necessary to levy a tax upon the people of the township, is unconstitutional.

SAME.—*State School Funds.—Loss by Bank Failure.—Taxpayers of Township not Liable.*—Where State school funds, coming into the hands of a township trustee for common school purposes, and not raised by taxation upon the township, are lost by the failure of a bank in which the trustee has deposited them, the Legislature has no power to impose upon the taxpayers of such township the burden of making good the loss.

SAME.—*Act to Relieve from Judgment.—Impairment of Obligation of Contract.—Relief of Public Officer.*—A legislative act seeking to release a township trustee and his bondsmen from liability on a judgment rendered against them on account of public funds lost in a failing bank, is void under section 24 of the Bill of Rights, as impairing the obligation of a contract, and for the additional reason that the Legislature has no power to reimburse a public officer for money lost by him in his official capacity.

From the Marion Superior Court.

W. N. Harding and *A. R. Hovey*, for appellant.
F. J. Van Vorhis and *W. W. Spencer*, for appellee.

DAILEY, J.—William H. Speer was trustee of Wayne township, in Marion county, Indiana, and of Wayne school township, in said county and State, from April, 1882, to April, 1884. Prior to August 10, 1883, he had deposited in the bank of the Indiana Banking Company, a bank of discount and deposit of the city of Indianapolis, Indiana, to his personal credit and in his individual name funds belonging to said civil and school township, to the amount of $5,278.75, of which amount $2,701.04

belonged to the school funds denominated in section 4,325 of the R. S. of 1881 as the "common school fund," interest on the "Congressional township school fund," and the "school revenue for tuitions," and $1,328.14 thereof belonged to the special school fund, all of which had come into the hands of said Speer as trustee of said Wayne school township for use in maintaining the common schools of said school township under the laws of the State of Indiana. On said 10th day of August, 1883, said bank suspended payment, and a receiver was appointed therefor, and said Speer lost the deposit. After the loss of the funds, said Speer, out of his private means, repaid himself as the trustee of said school township, all said sum of $2,701.04 belonging to said school fund, and also repaid to himself as such trustee $111.86, as part payment of said "special school fund," amounting in the aggregate to $2,812.90. Firman Stout was elected as successor in office to said Speer, and continued in office until April, 1888, when he was succeeded by John F. McClelland. On June 23, 1884, there was still due from Speer to said township, on other than school funds, the sum of $2.286.05, for which sum Stout, as trustee of said township, on that day recovered judgment against Speer and the sureties on his official bond in the superior court of Marion county, Indiana, $1,064.18 of which sum has since been collected and paid on said judgment through the receiver of the Indiana Banking Company. On April 8, 1885 (Acts 1885, p. 157), an act for the relief of said William H. Speer and the sureties on his official bond became a law (if constitutional) without the Governor's signature, by which act it was provided as follows:

Section 3, p. 159. "The trustee of Wayne township in Marion county, Indiana, is directed to pay to William H. Speer, late trustee of said township, twenty-eight hundred and twelve dollars and ninety cents ($2,812.90) out of the

township fund, being the amount paid into the several funds of said township by said William H. Speer on account of the loss by the failure of said Indiana Banking Company, in excess of one-half of ten hundred and thirty-two dollars and nine cents, dividend received from the receiver of said bank: Provided, he shall transfer to the trustee of said township all claims he may hold against said bank for money belonging to the township deposited therein."

Section 4, p. 160. "The said William H. Speer, and his sureties, Robert N. Harding and Israel J. Connorroe, are hereby released from all liability on account of judgment rendered in cause 32,370 of Marion Superior Court against the said Speer and his sureties in favor of the State of Indiana, on the relation of Firman Stout, trustee of Wayne township, and said trustee is directed to enter satisfaction thereof upon the record."

Section 5 declares an emergency.

Upon the passage of said act said Speer transferred to said Stout, who was then trustee of the township, all claims held by him against the bank for money belonging to the township deposited therein, and demanded of Stout, as such trustee, payment of said sum of $2,812.90, or, if he did not have sufficient township funds on hand to make such payment, that he levy a tax sufficient to pay that amount. This the trustee refused to do, and, upon the election of said McClelland as successor in office of said Stout, Speer renewed the demand upon McClelland, as trustee, and, not receiving payment, brought this suit in the superior court of Marion county to procure a mandate against the appellant, requiring him to forthwith make such payment, or if there were not sufficient funds on hand for that purpose, to levy a tax sufficient therefor.

All these facts are fully set out in the appellee's com-

plaint, and also in the alternative writ of mandate, together with the specific statement that at the time the relator was elected trustee the funds of the township and school township were deposited in the Indiana Banking Company of Indianapolis, Indiana, a bank in good standing and generally regarded as solvent; that such funds remained deposited at said place, and such other funds of said township as came into his hands; that the relator had no knowledge of any kind that led him to believe or suspect that the money deposited in the bank was not secure; that prior to the 10th day of August, 1883, he had deposited the funds of said civil and school township to the amount of $5,278.83; that said funds remained in said bank on said date and were lost by the failure of the bank without any fault or negligence on the part of the relator. On this complaint and affidavit the court made an order directing the alternative writ of mandate to issue, and the same was issued. To this writ a demurrer was filed, which demurrer was overruled. Thereupon a return was made to the alternative writ of mandate in four paragraphs, the first of which was afterwards withdrawn.

The remaining paragraphs of the answer allege, substantially, "that the money that came into the hands of the relator was for the purpose of maintaining schools in the township; that the relator repaid himself the sum of $2,701.04, belonging to the tuition fund, and $111.86 belonging to the special school fund, out of his own private means; that these two items are the same money which the relator repaid himself; that the defendant only has on hands a small amount of money, not over $50; that he expects to draw from the county treasury the sum of $525, or about that amount; that said amount, together, will barely pay the current expenses of the township during the current fiscal year, and until the

next levy of taxes for township purposes can be made and collected, and that to pay out the money on hands and to come into his hands, as aforesaid, will leave him destitute of means to carry on the necessary business of the township. And in the last paragraph it is alleged that the funds so repaid by said relator to himself as such trustee were special funds raised under said law for maintaining the common schools of the State; that they were not originally raised by direct taxation in said school township or elsewhere, and that the property in said Wayne township can not be taxed for the purpose of repaying said relator for funds paid by him into said 'common school fund,' 'interest on Congressional township school fund,' and 'school revenue for tuition fund.'"

The relator filed his separate demurrers to the second, third and fourth paragraphs of the return. The demurrers to each paragraph of the return to the alternative writ were sustained, to which the appellant excepted. The appellant refused to amend said paragraphs of answer, or to further answer said complaint, and elected to abide the rulings of the court on the demurrers to the several paragraphs of the answer as herein above stated; whereupon judgment was entered and the writ of mandate issued against said McClelland, trustee as aforesaid, to which judgment the appellant excepted. This judgment was against John F. McClelland, trustee of Wayne township, and no judgment whatever was entered against the trustee of Wayne school township. Such school trustee, therefore, has no interest in this appeal, but appears hereto for the purpose of saving any question as to the parties. The appellant filed a motion for a new trial, which was overruled, and he appealed from the special to the general term of the superior court. No assignment of error is made upon the motion for a new trial. The assignments of errors on appeal by the township

trustee, from the special to the general term of the superior court were as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling the demurrer to the complaint herein.

3. The court erred in sustaining the demurrer to the second paragraph of the defendant's return to the writ of mandate herein.

4. The court erred in sustaining the demurrer to the third paragraph of the defendant's return to the writ of mandate herein.

5. The court erred in sustaining the demurrer to the fourth paragraph of the defendant's return to the writ of mandate herein.

The appellant's assignment of error in this court is that "the court in general term erred in affirming the judgment of the court in special term."

The first and second assignments of error involve the constitutionality of the act for the relief of William H. Speer, of April 8th, 1885 (Acts 1885, p. 157, *supra*), and the power of the Legislature to indirectly impose taxation upon a township for such purpose. Counsel for the appellant say: "The relator had no claim whatever, legal or equitable, against Wayne township. He had been trustee of the township, and as such had given bond with approved security. As such trustee it was his duty 'to receive all money belonging to the township, and pay the same out according to law, as right and justice shall require,' and 'to see to a proper application of all moneys belonging to the township for road, school or other purposes' (section 5993, R. S. 1881); that 'it is also provided by section 4438 that the trustee of the township shall, for his township, be the school trustee and perform the duties of clerk and treasurer for school pur-

poses.' The preamble of the act of the Legislature of 1885, *supra*, recites that "William H. Speer, late trustee of Wayne township in said county, did, while acting as such trustee, deposit in said bank fifty-two hundred and seventy-eight dollars and seventy-five cents ($5,278.75) belonging to said township," and "that on the 10th day of August, 1883, said Indiana Banking Company * * * failed and suspended payment."

It is well settled in this State that the failure of the bank did not excuse the trustee from making good the loss. He was bound, as a public officer, to keep the funds in his hands safely. He was an insurer of the safety of the funds, and he was bound to account for the money lost by him, although lost without his fault. The amount of money he received measured his liability. *Rock* v. *Stinger*, 36 Ind. 346; *Inglis* v. *State, ex rel.*, 61 Ind. 212; *Linville* v. *Leininger, Tr.*, 72 Ind. 491; *Bocard* v. *State, ex rel.*, 79 Ind. 270.

The answer in the case of *Inglis* v. *State, ex rel.*, *supra*, disclosed the fact that the money had been deposited by the trustee in the First National Bank of Madison, Indiana, on the advice of the State Superintendent of Public Instruction, the school examiner and the board of commissioners of the county. The bank failed and suspended payment, and this court held that "the trustee was liable for the money to the township, although he may have made the deposit in good faith, acting with ordinary prudence, and although he may have lost the money by the insolvency of the bank, without any negligence or want of care on his part. He was not a mere bailee of the money; but he became bound by his bond to the township for it, whatever casualty might have happened to him, whereby he lost it." Such was the status of the appellee's relator at the time of the enactment of April 8th, 1885, *supra*.

Appellant's counsel concede that it is not a valid objection to the exercise of legislative powers in matters of taxation, that the claim, to satisfy which the tax was levied, was not recoverable by an action at law; but they insist that while the act in question does not in express terms require the trustee to levy an additional tax to meet this claim, it in effect does so; for if it is valid, the result is that an increased tax must be levied on the township to pay this specific claim; that it is, therefore, in effect, a local and special law for the assessment and collection of taxes off of the citizens of Wayne township only, to make good a loss of State tuition funds while in the hands of Speer as a public officer, and requiring the application of public money belonging to the township, and raised by taxation of its citizens, to the replacement of money in large part never raised by taxation of any kind, and in part raised by a State and not a township tax; that taxes are contributions paid by the inhabitants of a county for the use of the government; that a tax for private purposes is unconstitutional, though it pass through the hands of public officers and is a solecism in language; that taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising of it for private objects and purposes; that the Legislatures of the States have no power in the right of taxation to take private property, without the owner's consent, for any but a public object; that every person ought to contribute his just proportion to the public burthens, and for the purposes and exigencies, but he can not legally be called upon to contribute more than his equal and just proportion for such purposes; that this would be the result if the township could be taxed to reimburse the trustee; that such apportionment would be contrary to the spirit of the constitution of Indiana, and would violate the spirit of our institu-

tions and impair the property rights which it is the object of a free government to protect; that this was a flagrant abuse of legislative power, which the courts are authorized to investigate and correct.

Numerous other criticisms of the statute in question are indulged in by the learned counsel for the appellant in their exhaustive brief, which we can not consider at length in the space necessary to this opinion. They call our attention to the preamble to our State constitution, R. S. 1881, p. 13, declaring its purpose and object in these words: "To the end that justice be established, public order maintained, and liberty perpetuated." Counsel say, the first object named is that "justice be established." Does it tend to establish "justice" to levy an arbitrary and oppressive tax upon the taxables of a township to give it to one of its citizens who does not and can not set up any legal or other claim to it?

Such an act they say tends to subvert all their ideas of "justice," and is clearly inconsistent with, and prohibited by art. 1, section 23 of the Bill of Rights in our State Constitution in this language: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," and that the power of taxation vested in the Legislature is limited and restricted by section 22, article 4, of our State Constitution as follows: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the assessment * of taxes for State, county, township or road purposes." And by section 1, article 10 of the constitution, it is provided that the "General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation." Counsel, in the discussion of this question, we think, lose sight of the fact that there are other pro-

visions in the fundamental law of this State that must be considered and construed in connection with those to which they call our attention, and under them the act in question can not be regarded as private legislation. Section 23, article 4, provides that: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Section 27, article 4 of the constitution of this State (Burns' Rev. 1894, section 123), declares that "every statute shall be a public law, unless otherwise declared in the statute itself." There is nothing in the act declaring it to be private. The act, therefore, for the relief of the appellee's relator, is a public statute, made so by the constitution, and must be so regarded by the court, and the decision of the question at bar must be made with reference thereto. Besides the subject-matter of the act indicates that it is public. It attempts to dispose of the public funds for the relief of the appellant, for the money lost by him as a public officer. The distinction between public and special statutes is that courts take judicial notice of public statutes without pleading, but not of private statutes. 2 Bouv. Law Dict. (Title), Statute, p. 663; *Hingle* v. *State*, 24 Ind. 34. We think, however, a public statute can not be valid, which is intended to, and does in effect, so tax an individual as to take private property for private use. It seems, from the record, that the appellee's relator, William H. Speer, voluntarily made up the money he had lost, to the amount of $2,812.90, belonging to the various school funds, and this being so, he occupied to his township, as to that money, the position neither of debtor nor creditor. He had no right in law or in equity to a return of the money, and a return of it to him would amount to nothing short of a gift. Raising the funds

for that purpose from the various taxpayers of Wayne township, by tax, would be, in effect, taking the property of one man to bestow it upon another. It would be a taxing of the property of the citizens of that township for a private, and not a public use.

Here was an unconstitutional discrimination between citizens, in this, that the act arbitrarily requires the taxpayers of Wayne township to give the relator the sum of $2,812.90, and fastens upon the township and its taxpayers a debt for that amount, for which the township never received anything, and for which it never gave its consent nor contracted a liability. In our opinion the General Assembly is not vested with the power to legislate a tax upon the people of a township for a private purpose, and the court can not, with the design of carrying out such an act, require the township trustee to levy a tax therefor. In Hare's Am. Constitutional Law, volume 1, p. 278, it is said: "To warrant taxation, the purpose must consequently not only be beneficial but concern the public. A merely private benefit is not enough, although conferred upon the parties who oppose the tax and affording an ample compensation; because under a free government, when no public considerations are involved, every man should be allowed to choose for himself.* * A tax, as defined in Webster's Dict., * * 'is a burden imposed by the legislature on persons or property for public purposes,' and no tax which manifestly contravenes this principle can be valid." Citing the *Loan Association* v. *Topeka*, 20 Wall. 655; *People ex rel.*, v. *Board of Supervisors*, 26 Mich. 29. We quote from *Allen* v. *Inhabitants of Jay*, 60 Me. 124, as follows: "Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes." In *Sharpless* v. *Mayor, etc.*, 21 Penn. St. 147, BLACK, C. J., said: "I concede that

a law authorizing taxation for any other than public purposes, is void." In *City of Camden* v. *Allen*, 2 Dutch. 398, GREENE, C. J., remarks that "A tax, is an impost levied by authority of government, upon its citizens or subjects, for the support of the State." In *Hanson* v. *Vernon*, 27 Iowa 28, DILLON, C. J., observes that, "No authority * * nor even dictum can be found, which asserts that there can be any legitimate taxation, where the money to be raised does not go into the public treasury, or is not destined for the use of the * * governmental divisions of the State." In the case it was further said: "The acquisition, possession and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation, against the consent of those whose money is loaned, would be to withdraw it from the protection of the constitution, and submit it to the will of an irresponsible majority. It would be robbery and spoliation of those whose estates, or a portion of whose estates, is thus confiscated. No surer or more effectual method could be devised to deter from accumulation, to diminish capital, to render property insecure, and thus paralyze industry."

In *Lowell* v. *City of Boston*, 111 Mass. 454, the court held an act of the Legislature unconstitutional and void, that authorized the city of Boston to loan, on sufficient security, to the sufferers from a great fire in that city, amounts not exceeding in the aggregate twenty million dollars, to enable them to rebuild upon their property, because it was an appropriation of public money to private use, and made taxation necessary for private purposes.

In the case of *Thorndike* v. *Inhabitants of Camden*, 82 Me. 39, the appellant, as collector for the appellee, improperly accepted a note in payment for certain taxes,

and, after having accounted for it as money, and being unable to collect it, the town voted a tax to reimburse him. It was held by the Supreme Court that the citizens could not be taxed for such a purpose, and that property can only be taxed for lawful public purposes.

So, in *Bristol* v. *Johnson*, 34 Mich. 123, a statute was held unconstitutional and void which provided for raising money by taxation to reimburse a township treasurer for a sum paid by him to the township to make good an amount of the public money of which he had been robbed.

In *In re Deansville Cemetary Assn.*, 66 N. Y. 569 (572), it was held that "Whether the use is in its nature private or public is the question upon which the right of the Legislature to interfere with private property depends. All cases concede this principle. Whether the use is of a public or private nature can only be determined by judicial inquiry."

The case of *Hanson* v. *Vernon*, *supra*, also declares it to be a judicial question.

We think the law is well settled that nothing can fairly be regarded as a public use, unless it be a State use or a national use in furtherance of a State use. To defray the necessary expenses of a township, or to make necessary improvements in a township, is a State or public use. But the donation of a large sum of money to the relator in this case can not be regarded as a public use of money. It is not pretended, in the pleadings in the case at bar, that there was any money in the treasury at the time the special legislation for the benefit of the relator was passed and became a law, out of which the money so generously sought to be donated to him could have been paid. The record shows there was but $439.53 in the treasury even up to the time of the trial. In this

case, only a small part of the funds lost by the public officer was raised by taxation.

In the third paragraph of return to the alternative writ of mandate, it was alleged that of the money lost by Speer, by failure of the bank, $2,701.04 belonged to the funds denominated in section 4325 of the Revised Statutes of 1881, the "common school fund," "interest on the congressional township school fund," and the "school revenue for tuition," and that $1,328.14 thereof belonged to the "special school fund"; that after the failure of the bank, Speer repaid himself, as trustee, out of his own private funds, all of said sum of $2,701.04 owing to the common school fund, interest on the congressional township school fund, and the school revenue for tuition, and $111.86 on the amount lost out of the special school fund. Judgment was not taken against Speer and his sureties for any part of the money so repaid. This was the very money for which the General Assembly has attempted to reimburse him. This was pleaded as a return only to so much of the alternative writ as related to a recovery of the aforesaid sum of $2,701.04 belonging to said school funds, other than the special school fund.

By section 4325, R. S. 1881, it is provided that "The funds heretofore known and designated as the surplus revenue fund, all funds heretofore appropriated to common schools, the saline fund, the bank tax fund, the fund which has been derived or may be derived from the sale of county seminaries and the property belonging thereto, the moneys and property heretofore held for such seminaries, all fines assessed for breaches of the penal laws of the State, all forfeitures which may accrue, all lands and other estate which shall escheat to the State for want of heirs or kindred entitled to the inheritance thereof, all lands which have been granted, or may be granted hereafter, to the State, when no special object is

expressed in the grant, the proceeds of the sales of the swamp lands granted to the State of Indiana by the act of Congress of September, 1850, the taxes which may be assessed from time to time upon the property of corporations for common school purposes, and the fund arising from the one hundred and fourteenth section of the charter of the State Bank of Indiana, shall be denominated the 'common school fund.'" See, also, section 2, article 8, of the State Constitution.

No such tax as seems to have been contemplated in this act against the property of corporations having previously been authorized, and no such tax collected, no part of the money lost by Speer belonging to the "common school fund" was raised by taxation.

On the 19th day of April, 1816, Congress invited Indiana to meet in convention and take her place among the sisterhood of States, tendering for her free acceptance or rejection the following proposition:

"That the section numbered sixteen, in every township, and when such section has been sold, granted or disposed of, other lands, equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." Goodrich's History of Indiana, p. 273.

This proposition was accepted.

By section 4325, R. S. 1881, it is provided that "The fund derived from the sale of congressional township school lands, and the unsold congressional township school lands, at the reasonable value thereof, shall be denominated the 'congressional township school fund,' and shall never be diminished in amount, the income of which, together with the taxes mentioned and specified in the first section of this act (section 4465), the money and income derived from licenses for the sale of intox-

icating liquors, and unclaimed fees, as provided by law, shall be denominated the 'school revenue for tuition.' ''

The State, through these means, had on hand at the time Speer was trustee of Wayne township, a principal sum of about nine million dollars, which can not be diminished, the income of which was apportioned through the State and applied to furnishing tuition to the common schools thereof.

The only portion of the sum of $2,701.04, heretofore mentioned, that was raised by taxation was such as was apportioned to the township out of the "school revenue for tuition," raised on the State tax provided for in section 4465, R. S. 1881, which provides for a sixteen cent levy on "each one hundred dollars of taxable property—real and personal—in the State, and fifty cents on each taxable poll, for the purpose of supporting a general system of common schools."

None of the money so lost, therefore, except the small sum of $111.86, was money raised by taxation off of the citizens of Wayne township.

These were State funds turned over to the trustee, as a public officer, to be applied by him to furnishing tuition to the common schools of a political division of the State.

Upon the loss of such funds by this officer, the General Assembly could not lawfully or justly impose upon the citizens and taxpayers of Wayne township the burden of making good such loss.

This branch of the case presents the question of the right of the Legislature to divert township funds to other than local or township purposes; and, in this, it differs from the case of *Mount, Tr.*, v. *State, ex rel.*, 90 Ind. 29, and *Board, etc.*, v. *McLandsborough*, 36 Ohio St. 227, upon which appellee relies in support of the

contention that the act now assailed is valid. In the case last cited, the court declared that the power of relieving a public officer from the responsibility for loss of public money was purely legislative, where the funds so lost were raised by taxation.

While we do not approve the doctrine expressed, that the Legislature may, under any circumstances, relieve a trustee from the obligations of his contract, yet, in neither of the cases cited, does the court recognize a right in the General Assembly to legislate a debt upon the people to be liquidated by taxation, unless the funds lost were "raised by taxation"; and they must have been raised by local taxation on the political division to be charged with the burden. This principle is recognized in *Farris* v. *Vannier*, 6 Dak. 186; Cooley Taxation, chapter 5, pp. 144, 145; 1 Desty Taxation, 26, 27; *Hammett* v. *Philadelphia*, 65 Pa. St. 146 (151); *Dorgan* v. *City of Boston*, 12 Allen, 223; *In re Flatbush*, 60 N. Y. 398; *County Com'rs* v. *Com'rs, etc.*, 70 Md. 443.

So far as the act in question attempts to release the trustee and his bondsmen from liability on account of judgment rendered against them in the Marion Superior Court, we think the act is in conflict with section 24 of the Bill of Rights, which provides that "No * * * law impairing the obligation of contracts, shall be passed," and is therefore void, and, further, that the Legislature has no power to reimburse a public officer for money by him lost in his official capacity.

In our opinion, the act of April 8, 1885, *supra*, for the relief of William H. Speer, is inoperative and void, and the court erred in the several rulings complained of.

The judgment of the court below is reversed, with instructions to overrule the demurrer to the second, third and fourth paragraphs of the defendant's return to the

writ of mandate herein, and for further proceedings not inconsistent with this opinion.

Filed June 20, 1894.

No. 16,977.

CHAMPER *v.* CITY OF GREENCASTLE.

MUNICIPAL CORPORATION.—*Powers of.*—Municipal corporations have such powers only as are conferred upon them by the act of the Legislature creating them, and such incidental powers as are implied by their creation, and as are essential for the accomplishment of the purposes of their creation, and for their continued existence.

SAME.—*City Ordinance, when Subject to the Objection of Unreasonableness.*—A city ordinance passed under such implied power, or under a general grant of power, is not valid unless it is reasonable and within the power conferred, either by express statute or by necessary implication.

SAME.—*City Ordinance.—To Regulate Places Where Intoxicating Liquors are Sold.—When Reasonableness of Ordinance may be Inquired Into.*—The power conferred upon municipal corporations (R. S. 1881, section 3154) "to regulate all places where intoxicating liquors are sold to be used on the premises" (R. S. 1881, sections 3106, subd. 13), is a general grant of power, and a city ordinance passed under such general authority is open to the inquiry whether its passage is a reasonable exercise of the power conferred by statute.

SAME.—*City Ordinance Regulating Places Where Intoxicating Liquors are Sold.—When Unreasonable and Invalid.*—A city ordinance forbidding the erection or maintenance of door screens, window blinds, or stained, ground, colored or darkened glass to the doors, windows or openings of any saloon, shop or other place where intoxicating liquors are sold to be used on the premises; or the erection, maintenance of any obstruction of any kind whatever, of such doors, windows or openings, that will obscure or prevent a full view of the interior of such saloon, etc., and providing that the ordinance shall not be so construed as to prevent saloon keepers and others mentioned from having the usual and ordinary shutters to their doors, is unreasonable and invalid.

From the Putnam Circuit Court.

C. C. Matson and *P. O. Colliver*, for appellant.

T. T. Moore, for appellee.

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McCabe, C. J.—This was a suit by the appellee against the appellant, begun in the mayor's court of said city, to recover the penalty provided for the violation of an ordinance of said city. Appellee recovered judgment, from which appellant appealed to the circuit court, where appellant's demurrer to the complaint, for want of sufficient facts, and his motion to dismiss the cause, were both overruled, after which appellee again recovered judgment. Appellant assigns for error these rulings of the trial court, and that the complaint does not state facts sufficient.

The whole question, thus raised, turns upon the validity of an ordinance of said city, which reads as follows: "An ordinance to provide for the removal of all saloon screens and window blinds, and providing penalty for the violation of such ordinance. Whereas it is claimed that there have been frequent violations of the liquor law in the city of Greencastle, Indiana, by the saloon keepers of said city in selling intoxicating liquors to minors and intoxicated persons, and also in allowing minors to congregate in such saloons around the pool table and billiard tables kept therein; and whereas, it has been found difficult, if not impossible, to obtain the evidence necessary to secure a conviction for such violations of law, owing to the blinds and screens erected and maintained by such saloon keepers to the doors and windows of such saloons, so as to obscure and prevent a view of the interior thereof; therefore, for the better policing of said city, and the more perfect enforcement of law, be it ordained by the common council of the city of Greencastle, Indiana, that it shall be and is hereby made unlawful for any person or persons who own, operate or run any saloon, shop, or other place where intoxicating liquors are sold to be used in and upon the premises within said city of Greencastle, Indiana, or within two miles beyond

the corporate limits of said city, to put up, erect or maintain any door screens, window blinds, or stained, ground, colored or darkened glass of any kind to any of the doors, windows or openings of such saloon, shop or other place where intoxicating liquors are sold to be used in and upon the premises, or to put up, erect or maintain any obstruction of any kind whatever, to any of such doors, windows or openings, that will in anyway obscure or prevent a full view of the interior of such saloon, shop or place aforesaid, but all such screens, blinds and stained, ground, darkened or colored glass, and all other obstructions aforesaid to the doors, windows and openings of such saloon, shops and places where intoxicating liquors are sold as aforesaid, shall be taken down and removed, so as to give a full and unobstructed view of the interior of such places at all times: *Provided* that nothing herein contained shall be so construed as to prevent said saloon keepers and persons aforesaid from having the usual and ordinary shutters to said doors. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor of said city, be fined in any sum not less than ten dollars nor more than one hundred dollars for each offense, and each day that such obstruction shall be put up, erected, maintained, or remain in place, shall constitute a separate and distinct offense. This ordinance shall be in force and take effect from and after its passage and publication."

It is contended on behalf of the appellant, that this ordinance is void because it is unreasonable, oppressive, and is in violation of the constitution, because it invades the rights of private property.

The validity of the ordinance depends upon the answer to the question: Had the municipal corporation of Greencastle the power to pass the ordinance? / Mu-

nicipal corporations have such powers only as are conferred upon them by the act of the Legislature creating them, and such incidental powers as are implied by their creation and as are essential for the accomplishment of the purposes of their creation and for their continued existence. *City of Lafayette* v. *Cox*, 5 Ind. 38; *Kyle* v. *Malin*, 8 Ind. 34.

All acts of such corporations not strictly within these limits are void. Their acts can not be declared void by the courts because of any supposed conflict between them and the constitution so long as their acts are authorized by the Legislature, and the act of the Legislature is not in conflict with the constitution.

It is well settled that the creation of a municipal corporation carries with it the implication that such corporation is empowered to pass such ordinances and by-laws as may be needful for its well being. 1 Dill. (4th ed.) Munic. Corp., sections 315 and 316, and authorities there cited.

It is also well settled law that where an ordinance is passed by such municipality under no other authority than such implied power, the ordinance to be valid must be reasonable; and if it is unreasonable it will be void. 1 Dill. (4th ed.) Munic. Corp., section 319, and authorities cited.

The first question, therefore, that confronts us is whether the passage of the ordinance was a reasonable exercise of the power conferred upon the corporation, and, therefore, whether the corporation had the power to pass it or not. It is to be regretted that counsel on neither side have furnished us with such a discussion of the question as its great importance seems to demand, as it is one of first impression in this court. Therefore, we have gone far beyond the briefs in our investigation, in order to reach a correct solution of the question. At the

threshold of this discussion we are met with the suggestion that this court has held in two cases that no inquiry can be made into the reasonableness of the ordinance when the Legislature has enacted anything upon the subject, and hence it is suggested that in such a case the Legislatuse has delegated to cities the power to exercise a discretion in such matters, and, therefore, in such case the courts can not review that discretion.

The first of the cases referred to is *A Coal-Float* v. *City of Jeffersonville*, 112 Ind. 15, where it was said: "The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely," and refers to sections 319 and 328, 1 Dill. (4th ed.) Munic. Corp., as authority for that statement. If the quotation is to be construed as meaning that no inquiry in such a case can be made into the question whether the ordinance was a reasonable exercise of the power conferred, then the language is too broad; if, however, it is to be construed to mean that no inquiry can be made as to whether the ordinance is reasonable or not where the power to pass it has been conferred, then it is correct. We think the latter is the proper construction to be placed on the language employed.

Section 328, of Dillon, *supra*, is the one that relates more directly to the point involved in the above quotation. It reads as follows: "Where the *Legislature*, in terms, *confers upon a municipal corporation the power to pass ordinances of a specified and defined character*, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been re-

garded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done can not be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."

This is undoubtedly a correct statement of the law and is amply supported by the adjudicated cases wherever the point has come in question. It affords support to the statement of the rule by the learned judge who wrote the opinion from which we have quoted above only when construed as we have indicated. That was a case in which a recovery in attachment was sought against the boat for wharfage due the city of Jeffersonville. The question arose on the sufficiency of the complaint which set out the ordinance, which provided that "all steamboats, barges, keel boats, flat boats, or other boats or rafts, coming to or landing at the wharves of said city, shall pay to said city, to wit: * * For every coal float used, etc., $200 per year payable, etc."

The statute authorizing the enactment of the ordinance is the 34th subdivision of section 3106, R. S. 1881, which confers on cities the power "To establish and construct wharves, docks, piers and basins; and to regulate landing places, *and fix the rates of landing, wharfage*, and dockage on all public grounds belonging to such city." * * * This court held in that case, and we think correctly under the statute above quoted, that "cities are expressly authorized * * * to fix rates of wharfage and dockage," and therefore expressly authorized to pass the ordinance above set out. And hence,

no question of the reasonableness of the ordinance could arise in that case because the Legislature had conferred the authority on the city to pass an ordinance of that specified and defined character, and the section of Dillon cited as above set out, and authorities there cited, as well as the facts, fully warranted the conclusion reached in that case, but neither the case then before the court, nor the authority cited warranted the statement of the abstract proposition quoted, unless construed as we have indicated above. The same question incidentally arose on an appeal to this court from a judgment for a personal injury through negligence of appellant in the *Cleveland, etc., R. W. Co.* v. *Harrington*, 131 Ind. 426, where the language above quoted from the coal float case is again quoted. The question there incidentally arose as to the validity of an ordinance limiting the speed of engines and trains within the corporate limits of the City of Indianapolis. This court held that the Legislature had expressly conferred the power on the city to pass such an ordinance. Therefore, when this court reached the conclusion which it correctly did in that case, that because the Legislature had conferred the power to pass the ordinance of the specified and defined character mentioned, it had decided all there was touching that point in the case, and the quotation from the coal float case was unnecessary to the decision; though the enunciation was correct in both of the cases with the construction we have placed upon it.

Bills v. *City of Goshen*, 117 Ind. 221, involved the validity of an ordinance requiring, among other things, a license for a roller skating rink, which provided that the same should be granted upon the payment of such sum as the mayor and common council should determine in each particular case. The 14th subdivision of section 3106, R. S. 1881, empowered cities "to regu-

late and restrain all tables, alleys, machines, devices, or places of any kind for sports or games, kept for hire or pay, * if deemed expedient, without a license * * * to be provided for by ordinance." This court held the ordinance invalid because it placed the power to determine the amount of the license fee in each particular case in the mayor and common council instead of fixing the same in the ordinance. This was tantamount to holding that the ordinance was not a reasonable exercise of the power conferred by the statute. *First Nat'l Bank, etc.*, v. *Sarlls*, 129 Ind. 201, involved the validity of an ordinance making it "unlawful for any person to alter, repair, or rebuild any frame or wooden building within the limits described, when the cost shall equal or exceed three hundred dollars."

After recognizing the principle that cities in this State have ample power to enact and enforce reasonable ordinances in the absence of express statutory authority to secure protection against fire, the statute was referred to, conferring additional power, which authorizes cities "to organize a board of public improvements, and empower such board to grant permits to build houses or additions thereto; to prevent the erection of wooden buildings in such parts of the city as the common council may determine." As applied to repairs, it was held that the ordinance was invalid because the statute did not empower cities to prevent the repair of wooden buildings in all cases. This is not at variance with the broad language used in the coal float case, *supra*, construed as we have indicated. We briefly quote from some of the cases cited in support of the text of section 319, of Dillon, cited as authority in the coal float case, *supra*. In *Haynes* v. *City of Cape May*, 50 N. J. L. 55, it is said: "There are circumstances under which the court will inquire into the reasonableness of ordin-

ances passed by a municipal body under legislative powers granted to it.

"Those circumstances exist when the powers granted by the Legislature are expressed in terms general and indefinite. But where the Legislature has defined the delegated powers, and prescribed with precision the penalties that may be imposed, an ordinance within the powers granted, prescribing a penalty within the designated limit, can not be set aside as unreasonable."

And in another one of those cases it was said: "But the Legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits, to the mayor and city council of Baltimore, independent of the power 'to prevent and remove nuisances.' They are clothed with the power to pass ordinances 'for the prevention and extinguishment of fires,' for 'securing persons and property from danger or destruction, * * *. It has been well said in reference to such general grants of power that as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the mayor and city council are the exclusive judges, while the selection of the means and manner (contributory to the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. This discretion is very broad, but is not absolutely and in all cases beyond judicial control. * * And while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the courts in in-

terfering and setting it aside as a plain abuse of authority." *Mayor, etc.*, v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239.

In another of those cases it is said: "It is contended by the appellees that the town did not have the power to pass the ordinance. It is provided by statute that cities and towns have the power 'to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article for sale.' This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation; subject, however, to the general rule that the ordinance must be reasonable." *Davis* v. *Town of Anita*, 73 Iowa, 325. To the same effect is *Meyers* v. *Chicago, etc., R. Co.*, 57 Iowa, 555, also cited in Dillon.

And in another of those cases the Supreme Court of California said: "On this subject, the rule is this: Where the Legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done can not be set aside by the courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it

will be pronounced invalid." *Ex parte Chin Yan*, 60 Cal. 78.

To the same effect is *Ex parte Frank*, 52 Cal. 606, and many other cases cited in support of the text of Dillon, *supra*, and elsewhere too numerous even to cite, and we have been unable to find any case to the contrary, unless the two cases first above referred to in this court are to be so regarded. But as we have already intimated, we do not think they are to be regarded as against the current of authority, when the language employed in them is construed as we have done, and the cases were both correctly decided on the facts.

But before we can consider the question whether the ordinance here involved is a reasonable exercise of the powers vested in the corporation, we must inquire what the nature and extent of the powers are that have been conferred by the Legislature of this State upon municipal corporations; because if the Legislature has conferred the power to pass ordinances of the specified and defined character of the one here in question, according to the principles we have laid down above, then no inquiry can be made as to the reasonableness of the ordinance. In that event we would be limited in our investigation to the single question whether the act of the Legislature conferring the power was valid and constitutional or not.

The adjudicated cases cited by the appellee's counsel in support of the validity of the ordinance here in question were cases where the municipalities had been empowered by the Legislature of the State of Massachusetts to pass the particular and specified ordinances prohibiting the use of screens in saloons. No power has been conferred by the Legislature of this State on municipal corporations to pass ordinances of that particular character; that is, no statute has specified ordinances to prevent the use of screens by saloons as among those that

cities are empowered to pass. Hence the cases cited by appellee's counsel are not only not in point here, but their influence is against appellee's contention, if they are entitled to any weight at all, because the enactment of such a statute in Massachusetts is a tacit recognition by the lawmaking power of that State that municipal corporations there had no power to pass ordinances of that kind without a statute specifically authorizing the same. The statute upon which the claim is based in this case, that the corporation had the power to pass the ordinance here in question empowered cities "To regulate and license all inns, taverns, or other places used or kept for public entertainment; also all shops or other places kept for the sale of articles (liquors) to be used in and upon the premises" (Subd. 13, section 3106, R. S. 1881.); * * "and to regulate all places where intoxicating liquors are sold to be used on the premises." R. S. 1881, section 3154, and the general welfare clause.

It would be difficult to conceive of a more general grant of power. The two subdivisions of the sections referred to are almost as general and indefinite as the general welfare clause. The power to legislate upon a given subject is conferred upon municipal corporations, but the mode of its exercise is not prescribed, and the kind of ordinances that they are empowered to pass is not specified or defined. The Legislature has not said here what distinct or particular acts may be done by the corporation. It has not said that municipal corporations may pass ordinances of the kind here involved. If it had, that would end the inquiry. As it has not, by the uniform current of authority, ordinances passed under such a general grant of power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of

the State; otherwise it is the duty of the courts to declare them void.

We therefore hold that the ordinance here involved is open to the inquiry whether its passage is a reasonable exercise of the power conferred by the Legislature. It is strenuously insisted that the corporation, by the police power, is authorized to pass the ordinance in question, whether it is reasonable or unreasonable. The police power of the State, so far, has not received a full and complete definition. It may be said, however, to be the right of the State, or State functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins but not when and where it terminates. But this power, whatever may be its limits, resides in the State in its sovereign capacity, and can only be possessed and exercised by a municipal corporation by a delegation thereof to the municipality by the lawmaking power of the State. *City of Crawfordsville* v. *Braden*, 130 Ind. 149; 15 Am. and Eng. Encyc. of Law, 1166, 1167, and authorities there cited.

So that at last the validity of the ordinance depends upon whether it is a reasonable exercise of the power conferred or not. It forbids the erection or maintenance of door screens, window blinds, stained, ground, colored or darkened glass to the doors, windows or openings of any saloon, shop or other place where intoxicating liquors are sold to be used on the premises, or the erection or maintenance of any obstruction of any kind whatever, of such doors, windows or openings, that will obscure or prevent a full view of the interior of such saloon, etc.

Provided, That it is not to be so construed as to prevent such saloon keepers and other persons mentioned from having the usual and ordinary shutters to their doors.

Under this ordinance, if valid, it would make the use of the ordinary door screen or window shutters, window screens and window curtains to the doors or windows of a saloon unlawful, and it would likewise make it unlawful to maintain stained, ground, colored or darkened glass of any kind to any of such doors or windows.

We know of our own knowledge, common alike to all, that the use of door screens, window screens, window shutters, window curtains and blinds, ground, darkened and colored glass used in and to doors and windows are among the comforts and conveniences of civilized life. They are used in other business houses than saloons, in private residences, in public buildings and offices, in hotels and dining halls, in depots, in court houses, and in churches. Indeed, it may be said that they are necessary comforts and conveniences of civilized life, almost as much so as houses are to live in and to do business in. The protection of the occupants of such houses and places against the fierce rays of the sun in the proper use of such houses and places may be almost, if not quite, as necessary to protection against the storm and the rain, and the inclemency of the weather generally. It may be admitted that the evils arising from the sale of intoxicants have been so great that it has become the settled policy of the State, from the earliest times, to place and keep the traffic under stringent restrictions by the statutes of the State, and that these evils are often increased by violations of these statutory restrictions by licensed dealers. But we can not concur in the contention of appellee's counsel that the saloon "business is an illegitimate one, and that in order to make large profits therein it is necessary to constantly violate the law."

The business is one that any one could lawfully engage in, in the absence of any statute on the subject, and the statutes of the State, which, from time to time, have imposed restrictions and burdens upon the traffic, do not proceed upon the idea that the business is illegitimate, and seek to legalize an illegitimate business, but proceed upon the idea that the business is legitimate, and, owing to the evils arising from it, seek to place it under restrictions and burdens so as to lessen those evils.

Be this as it may, there is no reason in saying that because some saloon keepers violate the law all shall be deprived of the use of the necessary comforts and conveniences of civilized life in their business. If the corporation can make it unlawful for them to use screens to exclude flies and insects, they may make it unlawful for them to use shutters to their doors to exclude the cold, the storm, and the rain; if it can make it unlawful for them to use window shutters and window blinds and curtains, colored, stained, and ground glass in doors and windows of their saloons, under the pretense of permitting an unobstructed view into the interior of their saloons, the better to detect violations of the liquor law, then there is no reason why they can not be compelled to make the whole front of their saloons of solid glass, without any wood or any other material. Indeed, if the corporation has the power to make the ordinance here in question, for the reasons given in the preamble thereto, then it necessarily has the power by ordinance to compel them to open the whole front of their saloons, from one side to the other, without even the poor privilege of putting solid glass in as a protection against storm, rain, and the inclemency of the weather, and against theft and robbery.

This court, in *Decker* v. *Sargeant*, 125 Ind. 404, in hold-

ing an ordinance valid forbidding the use of screens by saloon keepers between 11 o'clock in the evening and 5 o'clock in the morning recognized the principle that such an ordinance might not be valid when applied to that portion of the day when the saloon keeper was authorized to sell under his license. There can be no doubt that such an ordinance would be within the power granted, and reasonable if it is confined in its operation to such times as the saloon keeper is not allowed to do business, as between 11 o'clock at night and 5 o'clock in the morning, on Sundays and legal holidays, and other days on which they are prohibited from doing business.

We are of opinion that the ordinance here involved goes beyond any power conferred upon the common council, either by express statute or by necessary implication, and, therefore, void.

The circuit court erred in overruling the demurrer to the complaint.

The judgment is reversed, the cause remanded, with instructions to sustain the demurrer to the complaint.

Filed Oct. 31, 1893; petition for a rehearing overruled June 8, 1894.

No. 16,867.

138 354
158 311

138 354
162 16

Cree, Administrator, et al. *v.* Sherfy.

Conveyance.—*From Father to Son on Consideration of Maintenance, etc., for Remainder of Life.—Death of Son.—Action to Set Aside Conveyance.—Demand.—Tender.*—Where a father conveyed land and farming implements to his son in consideration of $500 and a promise by the son to give him a home with him, and care for him in sickness, and do his washing and mending, for the remainder of the father's life, and the son did care for his father, and furnished him a home, as per agreement, for more than six years, when the

son died, having never paid the $500 which was evidenced by a note, the widow and infant children of the son having abandoned the father, home, and land shortly after the son's death, over the father's advice and objection, and never returned to look after or care for him, it was not necessary, before instituting an action to set aside the conveyance and cancel the note, that the father should demand a performance of the contract or that the land be restored upon a tender of the note, as neither the administrator, the widow, nor infant children, could have restored the land, and revested the father with complete title if the note had been surrendered to them.

SAME.—*Condition Subsequent, Breach of.—Reversion.—Action to Set Aside Conveyance.—Quieting Title.—Cancellation of Note.*—In such case, the court held that the deed was made upon a condition subsequent, viz: Home, maintenance, support, etc., for the remainder of his life, and that upon the breach of such condition in the manner above stated, the title reverted to the grantor, and that the father's title in the same should be quieted, and the $500 note, above mentioned, canceled.

From the Monroe Circuit Court.

J. H. Louden, T. J. Louden, and *E. Corr,* for appellants.

E. K. Millen and *H. C. Duncan,* for appellee.

DAILEY, J.—This is an action by the appellee against the appellants, to set aside a conveyance executed by the appellee to the decedent, Joseph D. Sherfy, and to quiet the title of the appellee. The appellants, Elmer Sherfy and Ida Sherfy, are minors, who appear by guardian *ad litem.* After the issues were made, there was a trial in the court below before the court, and at the request of the appellants the court made a special finding of the facts, and stated its conclusion of law thereon, on which judgment was rendered for the appellee. The appellants appeal to this court, and assign errors severally and jointly to the proceedings in the lower court. To the amended complaint filed in the cause the appellants demurred separately and severally for the reason that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, to which the

defendants excepted, and to this ruling each of the appellants separately and severally assign error, which brings into review the facts alleged in the complaint, viz: That on the 24th day of November, 1886, the plaintiff was the owner of certain real estate therein described, containing 53 acres, of the value of $5,000; that his son Joseph resided with him up to the time of his marriage with the defendant, Mary E. Sherfy, in 1885, after which said Joseph and his wife continued to live with the plaintiff; that on said 24th day of November, 1886, the plaintiff entered into a contract with his said son, by the terms of which he was to convey to the son said real estate and his farming implements, for the following consideration, to wit: The sum of $500, and the further consideration that the grantee should board the grantor, do his washing and mending, and wait on him in sickness, and otherwise care for him during the remainder of his life, which contract was executed in writing, and a copy thereof is filed with the complaint. Plaintiff further alleges that pursuant to said agreement, he conveyed said property to his son, Joseph D. Sherfy, but the consideration for such transfer has wholly failed in this, to wit: That although the said Joseph received, to his sole use and benefit, the said farming implements, etc., and the use, occupancy, and profits of said real estate for five years, etc., the plaintiff has at no time been paid the said sum of $500, or any part thereof; that on the 15th day of April, 1892, the said Joseph D. Sherfy died intestate, leaving surviving him his widow, the said Mary E. Sherfy, and his minor children, the defendants, Elmer and Ida Sherfy; that on the 21st day of April, 1892, the defendant, Robert A. Cree, was duly appointed administrator of the personal estate of said decedent, and is now acting as such; that by reason of the death of said Joseph D. Sherfy, and the abandon-

ment of the said contract and agreement, by any and all persons in any way claiming under him, the plaintiff was left alone, and re-entered and remained in possession of said premises to care for the same, and as best he could provide himself with the necessaries of life. Wherefore he asks that the title to said real property be revested in him, and quieted against the defendants, and for other proper relief. The sufficiency of the complaint, and the conclusion of law upon the facts found under any testimony that might have been properly heard on the trial of the cause, are the questions presented by the record. It is contended on behalf of the appellants that the complaint states no cause of action against the widow and children of Joseph D. Sherfy, because it does not allege a return or offer to return what was received by the appellee; that the complaint to be good on demurrer must show that Samuel Sherfy had tendered, previous to the commencement of this action, the note he held against the decedent for $500, and a sum of money equal to the value of his support for the six years he lived with the son. They also insist that the complaint is bad on demurrer, because it fails to allege a demand made by the plaintiff for the performance of the contract before it was filed, and that there is no allegation in the complaint showing conditions in the deed; that the agreement by decedent to pay $500, and "to board the father as a member of the family, * * * to do his washing and mending, and wait on and nurse him in time of sickness, and care for him tenderly as a son should care for his father during all the time of his natural life," was a contract and agreement outside of the deed, entered into by the plaintiff and the son after the deed was executed, and that the complaint contains no averment showing that the deed was made on a condi-

tion subsequent, and hence it is insufficient to warrant the relief sought and obtained.

It is a general rule that a contract will not be rescinded when the parties can not be placed *in statu quo*. In order to secure a party his rights, as well as to enable him to institute legal proceedings, in causes of action arising *ex contractu*, it is ordinarily necessary that a demand be made upon the party who is bound to discharge the obligation or perform the contract. The legitimate object of a demand is to enable the party to perform his contract or discharge his liability, agreeable to the nature of it, without a suit at law. In actions on contract, the failure to make a necessary demand before suit, is cured by proof that the defendant could not have complied with the demand. *Wilstach* v. *Hawkins*, 14 Ind. 541.

In 5 Am. and Eng. Encyc. of Law, 528d, it is said: "Where a matter alleged lies equally in the knowlege of the plaintiff and defendant, an averment of notice is not necessary, as if it be an act to be done by a stranger. Neither demand nor notice nor other diligence is necessary when the party to be charged had no right to expect it, and could not have been injured by the omission of it."

The doctrine is well settled that the law never requires the doing of a useless thing. Demand is not necessary when the person owing the debt or duty has means of knowing when it will become due as well as the opposite party.

The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, as far as practicable, prevails equally at the civil and common law, but it presupposes the idea that there are persons to whom the offer or transfer may be successfully made, and where, as in this case, there is no one

to whom the proffer of the note is due, or who is entitled to receive the same, the act would be of no avail, and it need not be averred.

In the case at bar, neither the administrator, the widow, nor the infant defendants could have restored the land in controversy to the appellee and revested him with complete title, if the note had been surrendered to them. In our opinion, it was not necessary to aver the tender of the note under the circumstances here presented, and we think the complaint is sufficient.

It is said, in 28 Central Law Journal, p. 321, that "Conveyances of property by aged and infirm people to their children, in consideration of promised support and maintenance, are somewhat peculiar in their character and incidents, and must sometimes be dealt with by the courts on principles not applicable to ordinary conveyances. A person incapacitated by the infirmities of age for active pursuits naturally feels a strong desire to place the fruits of his industry and enterprise where they will secure him, during the remnant of his life, a suitable and proper maintenance, without further care or labor on his part. One thus situated also naturally prefers to convey his property to his child for that purpose, and that his child, and not a stranger, should assume the obligation to maintain him. Paternal affection thus prompts him, and he relies upon the filial affection of his child for the faithful and cheerful performance of the obligation. And thus it is when an aged and infirm father conveys his property to his son, in consideration that the son shall care for and maintain him during the remainder of his life, elements enter into the transaction peculiar to such cases. Such a transaction * * is prompted often by necessity, always by affection for, and trust in, the son to whom he has transferred his means of support. Besides, the age and infirmity of the father

may unfit him in a degree properly to protect his own interests, and may render him subject to imposition. Hence it is that we seldom find in such transactions evidence of that deliberation and careful regard to self-interest on the part of the father, which usually characterize ordinary business transactions of the same magnitude. Because of these and other considerations peculiar to a case like this, it is the duty of the son, and he should regard it as his highest privilege, fully to perform his agreement. This is not only a moral and religious duty, but it is a duty of which a court of equity will take cognizance, and grant a proper relief for its nonperformance."

In the same journal, on page 324, it is said: "A contract to support is a contract for personal services; it can not be performed by another, unless the person receiving the support consents to receive it; and if the person who is to furnish the support die, then his heirs, executors or administrators must keep it."

As appears from the complaint and the finding of the court, the chief consideration for the conveyance was the home comfort of the grantor and his support in declining years. While the decedent lived, the contract was faithfully kept; after his death, the widow and children and aged father remained together for two weeks, when the widow and children, over his advice and objection, abandoned the home and removed to her mother's residence, four miles away, and never returned to look after or care for the appellee, leaving him as the sole occupant of the premises. The appellants having refused to remain and execute the agreement, they are in no better situation than the grantee would occupy if he were alive and had deserted the father. It would not be pretended that if the son had forsaken the father, under like circumstances, he would have any standing in a court of equity. It is the province of a court of conscience when

asked for relief, a right of action having arisen to one of the parties, to place the survivors as nearly in the position relatively they would have occupied, but for the death, as it was possible to do. Act of God inures as excuse and relief to both parties to a contract. If it legally releases the one from executing a work he has undertaken, it equally protects the other from paying for more than has been done. *Doster* v. *Brown*, 71 Am. Dec. 153.

The case we are now considering presents many features of resemblance to that of *Richter* v. *Richter*, 111 Ind. 456 (461), in which this court say: "The grantee having abandoned the land without sufficient excuse, and without offering to perform a continuous and fixed duty which rested upon him, no demand for performance was necessary in order to entitle the grantor to re-enter. Abandoning the land, under the circumstances, must be regarded as equivalent to such a renunciation of the contract as authorized the grantor to enter and treat the arrangement as at an end."

In the carefully considered case of *Lindsay* v. *Glass*, 119 Ind. 301 (304), it is said: "One who accepts the property of a sister, or a parent, and agrees in consideration thereof to furnish a home, with suitable maintenance and support, does not perform his contract fairly and according to its spirit by simply furnishing shelter and subsistence. A home is something in addition to a roof over one's head, with food and drink supplied by strangers." It is suggested by the learned counsel for the appellants that the deed in controversy is an absolute conveyance in fee, and no condition of any kind was annexed thereto; that a condition subsequent which will defeat an estate created by a deed, must be fairly expressed in the deed itself. This is too narrow a view of the question. The case is parallel in principle with *Leach* v. *Leach*, 4

Ind. 628, in which a father conveyed a farm to his son for the nominal consideration of one dollar. Contemporaneously with the conveyance, the son executed a bond to the father in which, after reciting the conveyance, he bound himself, in consideration thereof, to cultivate the land and deliver a certain share of the crops to the grantor during his lifetime. It was held that the son took the land on a condition subsequent. A difference of one day appears between the date of the deed of conveyance and the agreement for support, but this may have been the mere inadvertence of the parties and the scrivener, and their mutual mistake. The trial court found that they were contemporaneous, and the evidence not being in the record, we must conclude in favor of the correctness of its finding.

It is shown by the special finding that the decedent and the appellee were together three hundred and thirty-two weeks under this arrangement, and the latter's board, in excess of services, was worth $415; that the decedent improved the land to the amount of $150, and constructed buildings and made repairs worth $220. Total, $785, for which, if no remuneration were received, a recovery might be had in this or another action on the *quantum meruit* in favor of the administrator or heirs; but there was received by the grantee rent of land 6¼ years at $130 per year, $812.50; timber, $200. Total, $1,012.50, and in addition, as per agreement, all farming implements on the farm, the value of which does not appear. It would seem from these facts that the son was abundantly compensated for his services to the father, who is now eighty-two years of age, and the court so found. The court reached the conclusion that the deed was made upon a condition subsequent, which has been broken in the manner hereinbefore stated, and that the title of the appellee in the land should be quieted and

the $500 note canceled. The conclusion is so manifestly just that it ought not to be disturbed.

The judgment of the court below is therefore affirmed.

Filed June 5, 1894.

No. 16,664.

HOLLINGER *v.* REEME ET AL.

138	363
143	223
138	363
144	42
145	2
138	363
154	379
138	363
159	591

JUDGMENT.—*Fraud in Obtaining.—Necessary Showing in Application for Relief.*—A party who seeks relief from a judgment alleged to have been obtained against him by fraud must show in his application that he has a meritorious defense which he was prevented from making, that he was not guilty of laches in failing to prevent or discover the fraud, and that he seeks relief promptly after making the discovery.

SAME.—*Unauthorized Appearance by Attorney.—Remedy.—Injunction.*—Relief by a defendant against a judgment obtained through the unauthorized appearance of an attorney should be sought in the original cause by way of an application therein for a stay of proceedings and a hearing upon the merits, and not by way of a collateral proceeding for an injunction.

From the Vigo Circuit court.

M. Hollinger and *Mack* and *Henry*, for appellant.

J. G. McNutt and *F. A. McNutt*, for appellees.

DAILEY, J.—This was an action by appellant, Hollinger, against the appellees, Reeme, Quackenbush, and Stout, sheriff of Vigo county, to perpetually enjoin the collection of a certain judgment, and to have the same set aside and held for naught. The complaint is as follows: "Plaintiff, complaining, shows the court that on the 29th day of January, 1878, these defendants, Reeme and Quackenbush, filed a complaint in this court, cause number 9917, against this plaintiff and one David R.

Stith; that said action was upon a joint obligation purporting to be the joint obligation, not several nor joint and several promise of the said Stith and Hollinger, a copy of said complaint, pleadings and dockets and judgments are made a part hereof, exhibits marked 'A;' that on the 10th day of March, 1880, upon the hearing and trial of said cause, judgment was rendered against said Stith and this plaintiff Hollinger for the sum of $1,033.33; that on March 16, 1880, the said court, after proper hearing, duly rendered judgment in said cause against said Stith as sole defendant for said sum of $1,033.33, wholly releasing this plaintiff Hollinger from any liability thereon, and that said judgment duly rendered against said Stith still remains in full force and effect; that on the 12th day of August, 1880, these defendants, Reeme and Quackenbush, having fully abandoned the original claim, No. 9,917, brought a separate proceeding in said court against this plaintiff to bind him to, and as a party judgment defendant with said Stith in, the above recited judgment for $1,033.33; that this last cause referred to was No. 12,127, and, after proper hearing, judgment was awarded against this plaintiff for costs of the proceeding November 5, 1885, and the cause dismissed, and a copy of said pleadings and record is filed herewith as a part of this marked exhibit 'B'; that cause No. 9,917, although fully disposed of by the court and abandoned by said Reeme and Quackenbush March 16, 1880, still remained on the docket of the court, and plaintiff, believing the same was at an end, left the State in 1881 and removed to the territory of New Mexico, and remained a non-resident of this State until 1887; that no one was authorized to represent him in said cause or to make any agreement for him, and he had no knowledge that said suit was still pending in said court; that, as appears of

record in this court, on the 3d day of November, 1885, the defendants herein, Reeme and Quackenbush, or some one in their behalf, fraudulently and without this plaintiff's knowledge or consent, caused a judgment to be entered against this plaintiff and said Stith as by agreement, for $150 and costs for $50, and plaintiff herein says that he had been his own attorney in said cause and had no other; there never was such an agreement made by him, or any one authorized to make such, and that the entry of said judgment was a gross fraud upon him and this court, and that the court made no inquiry into the merits of said cause, and had such cause been submitted to the court for inquiry, no judgment could have been rendered against him; that plaintiff had no knowledge that said judgment had been rendered against him until about the time of the issuing of an execution on said judgment, which was on or about the 5th of June, 1891. Said execution was issued by the defendants, Reeme and Quackenbush, to the defendant Stout, who is sheriff of this county, who is threatening to levy the same upon the property of this plaintiff in this county. Wherefore, plaintiff prays the court to grant a temporary restraining order until the final hearing of this, and, upon the final hearing of this cause, to grant a perpetual injunction and set aside and hold for naught said judgment."

Appellees demurred to appellant's complaint, which demurrer was sustained by the court, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The error assigned is the sustaining of such demurrer. The only question raised, therefore, is the sufficiency of appellant's complaint. "Exhibit A," as suggested, is the record of the proceedings in cause No. 9,917, Vigo Circuit Court, and such cause is entitled

"Josiah B. Reeme, Augustus L. Quackenbush *v.* David R. Stith, Martin Hollinger."

The complaint in said 9,917 shows that Stith and Hollinger executed a note for $800 with interest to one Keith, who had assigned the same, before the suit was instituted, to plaintiffs, Reeme and Quackenbush. Action No. 9,917 seems to have been brought previous to February 27, 1878, for on that day it appears that defendants filed answers therein.

Upon issues joined the cause came on for trial on March 3, 1880, and the jury rendered a verdict for the plaintiffs in the sum of $1,033.33. On March 10, 1880, judgment was rendered on the verdict in favor of the plaintiffs, Reeme and Quackenbush, against the defendants, Stith and Hollinger. Said judgment was set aside on March 16, 1880. On June 8, 1880, the court overruled the motion of the defendants for a new trial and rendered judgment against Stith alone.

On the same day the record reads: "And comes now defendant Hollinger, and files his demurrer to plaintiff's complaint, and the court, being advised, overruled said demurrer, and the defendant excepts thereto, and is ordered to answer and a day is given."

It appears the case then lay dormant until November 3, 1885, when the record shows the following entry: "Come again the parties by their attorneys aforesaid and this cause being at issue and coming on for trial the same is, by agreement, submitted to the court, and by agreement the court finds for the plaintiffs and assesses their damages at the sum of one hundred and fifty dollars ($150)."

The judgment for $150 and costs is the one which the appellant seeks to permanently enjoin and set aside. "Exhibit B" is an exhibit of the record in cause No. 12,127 of the Vigo Circuit Court. The complaint is not

a part of it, having been lost, but cause 12,127 appears to have been an action to bind Hollinger by the judgment rendered in cause No. 9,917, for, upon a trial by the court, a judgment was rendered on June 8, 1881, in cause 12,127, declaring Hollinger bound by the judgment in 9,917. Such judgment was set aside, however, on January 14, 1882, and on June 7, 1882, Hollinger was granted a new trial.

Cause No. 12,127 was finally disposed of as follows: "Come again the parties by their attorneys and, by agreement of the parties, it is ordered that this cause be, and the same is, hereby dismissed at the cost of the defendant."

It is shown by the record that causes 9,917 and 12,127 were disposed of on the same day, viz, November 3, 1885, and by the agreement of the parties acting by their attorneys. Appellant seeks relief against the judgment in cause 9,917 because of an alleged fraud in its procurement; he charges that the judgment plaintiffs, Reeme and Quackenbush, procured an attorney to appear in his behalf and fraudulently agree to the judgment. While the demurrer to the complaint admits the truth of such allegation, it is proper to bear in mind that the action was upon a promissory note executed by Hollinger for $800, and that the appellant nowhere denies the execution of this note, nor does he deny that there was ample consideration for the same, nor does he claim that it has been paid in whole or in part.

It seems that as a result of years of litigation a judgment for $150 was rendered against the appellant, when the original note, executed by him on September 13, 1877, was for $800. In respect to attacks upon judgments procured by fraud, there are several well established rules for the guidance of the courts:

First. The person seeking to set aside the judgment

must show that he could not have prevented the fraudulent procurement of the judgment by the exercise of reasonable diligence.

Second. That he was reasonably diligent in discovering the fraud.

Third. That having discovered the fraud, he proceeded with reasonable diligence to ask such relief as the law affords.

Fourth. He must show that he had a meritorious defense to the action in which the fraudulent judgment was procured, and that the result will probably be different if he is allowed to open up the judgment and defend.

Fifth. If the court had jurisdiction of the subject-matter and the parties, and the fraud perpetrated was in the procurement of jurisdiction, he can not attack such judgment collaterally, but must ask that the judgment be opened up to such an extent only as will allow him to make a meritorious defense.

The appellant has not, by his complaint, brought himself or his defense within any of these rules.

According to the allegations of the complaint, appellant appeared to the action in which the judgment was rendered (No. 9,917), for he filed his demurrer to the complaint, which was overruled, whereupon he was ruled to answer. The filing of a demurrer to the complaint has always been recognized as a full personal appearance to the action. 1 Works Prac., 224; *Knight* v. *Low*, 15 Ind. 375.

The court, therefore, had jurisdiction of the subject-matter and the parties, and, on June 8, 1880 (the day the demurrer was filed), the action was pending in the Vigo Circuit Court.

Appellant alleges that in 1881, he left the State and removed to New Mexico, and remained a nonresident

until 1887; he also alleges that no one was authorized to appear for him in said action. It thus appears that he deliberately left a pending action from 1881 to November 3, 1885, when the judgment was rendered, with no one looking after his interests. This makes a case of gross negligence. It is true he alleges that the cause was fully disposed of by the court and abandoned by said Reeme and Quackenbush March 16, 1880, but he does not aver in what manner the case was disposed of, or how it had been abandoned; and "exhibit A" shows that he filed a demurrer to the complaint on June 8, 1880, three months after the alleged disposition and abandonment. He also alleges that he had no knowledge that said suit was still pending, but, in law, it was his business to realize, and he was bound to know it was pending, after he had entered a full appearance. It is also alleged that the appellant had no knowledge of the existence of said judgment rendered November 3, 1885, until June 5, 1891. He returned from New Mexico in 1887, but did not discover the judgment until June, 1891, nearly six years after its rendition, and four years after his return; presumably he had not made inquiry about the case from the time it was rendered up to June, 1891, a period of nearly six years; for the slightest investigation would have disclosed its existence. And, further, it does not appear that he made any inquiry about the pending action from 1881, when he left Indiana, until 1891, when he discovered the judgment. This does not constitute diligence. The existence of the judgment was made manifest to appellant June 5, 1891, and while the record does not reveal when this action was brought, the first step taken, as shown by the record, was on Monday, May 2, 1892, nearly a year after the discovery of the judgment.

"A party who seeks to have a judgment set aside for fraud practiced in obtaining the judgment, must show in his application, that he has a meritorious defense which he was prevented from making; that he was guilty of no laches in failing to prevent or discover the fraud, and that he made his application for relief without delay after the discovery." *Harmon* v. *Moore*, 112 Ind. 221 (227).

"The parties to an action can not impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was obtained through fraud or collusion. It is their business to see that it is not thus obtained. Black Judgments, section 291.

"In order to justify a court in enjoining the enforcement of a judgment claimed to have been obtained by fraud, mistake or accident, it is necessary for the complainant to show, in addition to the fraud or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on his part; and that he has been diligent in seeking relief." *Ratliff* v. *Stretch*, 130 Ind. 282 (285).

"A party who seeks the aid of a court, and asks to be relieved from a judgment obtained against him by fraud, must proceed promptly upon the discovery of the fraud." *Nicholson* v. *Nicholson*, 113 Ind. 131 (135). Appellant did not use ordinary care to prevent the alleged fraudulent judgment, having left the case pending in 1881, with no one to look after it until 1885, when the judgment was rendered; nor did he exercise diligence to discover it, for the slightest inquiry would have informed him of its existence, which he did not discover for six years; nor does he allege that he made any inquiry at any time. Besides, he was negligent in not bringing the action for relief after the discovery of the judgment until nearly a year after its rendition. It is always necessary, when

one seeks to set aside a judgment procured by fraud, to show that there is a meritorious defense to the action in which the judgment was rendered. Black Judgments, sections 347, 348, 349; *Harmon* v. *Moore*, *supra*, 227. Not only should it be averred that there is a good defense, but the facts constituting it should be stated and verified by affidavit. *Wilson, etc., Co.* v. *Curry*, 126 Ind. 161; *Goldsberry* v. *Carter*, 28 Ind. 59 (60); *Frost* v. *Dodge*, 15 Ind. 139; Black Judgments, section 347. As near as the appellant comes to alleging a meritorious defense is the following: "And the court made no inquiry into the merits of said cause, and had such cause been submitted to the court for inquiry, no judgment could have been rendered against him." This is in the nature of argument, and does not amount to an allegation that appellant had a meritorious defense in cause 9917, wherein the judgment was rendered. He should have stated the facts showing such defense, so that the court could have seen its merits and the injustice of the alleged fraudulent judgment. The appellant does not deny that he executed the $800 note sued on in cause 9917; he does not deny that there was a valuable and full consideration therefor; nor does he deny that it evidenced a fair and honest debt from him to the plaintiffs Reeme and Quackenbush, the assignees of the payee, Keith; nor does he claim that any portion of the debt evidenced by said note has been paid. He wholly fails to show that he had any defense, meritorious or otherwise, in cause 9,917, in which the judgment was rendered for about one-tenth of the sum represented by the principal and interest of the original note on which the recovery was had. It is clear that the court had jurisdiction of the subject-matter, and when the appellant demurred to the complaint it took jurisdiction of his person.

He does not claim that he did not file a demurrer to

the complaint, nor does he deny the court's jurisdiction of the subject-matter and the parties. Therefore such jurisdiction did exist in cause 9,917, and any judgment rendered therein would not be void, however wrongful or erroneous; such judgment not being wholly void can not be attacked collaterally. *Exchange Bank* v. *Ault*, 102 Ind. 322; *Anderson* v. *Wilson*, 100 Ind. 402; *Lantz* v. *Maffett*, 102 Ind. 23; *Palmerton* v. *Hoop*, 131 Ind. 23, on p. 28; *Cully* v. *Shirk, Exr.*, 131 Ind. 76, on p. 79; *Harmon* v. *Moore, supra*, 227; *Rogers* v. *Beauchamp*, 102 Ind. 33; *Reid* v. *Mitchell*, 93 Ind. 469. Where judgment is rendered through the unauthorized appearance of an attorney for the defendant, the defendant should not ask to perpetually enjoin the judgment, and have it declared a nullity, but should ask that it be opened up and the proceedings thereon stayed, until there can be a trial on the merits. *Coon, Admr.* v. *Welborn*, 83 Ind. 230; *Bush* v. *Bush*, 46 Ind. 70 (83); *Wiley* v. *Pratt*, 23 Ind. 628 (635); *Pierson* v. *Holman*, 5 Blackf. 482. "It may be, on a proper application showing that a judgment had been rendered by default, or for the want of an answer on an appearance by an attorney without authority, and without notice to defendant, even after judgment, the court will allow an issue to be formed, and the merits of the case tried; but the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead if he has any defense." *Bush* v. *Bush, supra*. "Such must now be deemed the settled practice of the court. It will always afford adequate relief to a defendant, while, at the same time, it protects a plaintiff who has obtained a judgment, so far as he can be protected, from some of the injurious consequences to which he might be exposed by the delay."

Wiley v. *Pratt*, *supra*, 636. "A judgment obtained by fraud is binding on the parties until set aside in some proceeding instituted for that purpose." *Palmerton* v. *Hoop*, *supra*, 28; *Weiss* v. *Guerineau*, 109 Ind. 438, on p. (444). "These methods, however, all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the notion, that a judgment, however wrongfully obtained, may be ignored, and the rights of the parties again inquired into, in a collateral proceeding." *Weiss* v. *Guerineau*, *supra*. Appellant has not sought relief in the original cause 9,917, in which the judgment was obtained, but presents a new and collateral action asking to have the judgment rendered therein decreed a nullity, and perpetually enjoined. He has mistaken his remedy, and the court can not lend him its aid. For the reasons stated we are convinced that the court below did not err in sustaining the demurrer to the appellant's complaint.

The judgment is affirmed.

Filed April 3, 1894; petition for a rehearing overruled June 5, 1894.

No. 16,837.

WILDS ET AL. *v.* WARD ET AL.

MORTGAGE.—*Of Building.—When Ground Included.*—A mortgage written and executed in the form of a real estate mortgage, but describing the property as "one one-story frame building store-room, situate on lot number forty-two, in block number thirty-four in the original plat of the town of Kirklin," includes not only the building but also that part of the lot upon which the building stands, and as much more as is necessary to the use of the building as a place for the sale of merchandise.

From the Clinton Circuit Court.

H. G. Sheridan, for appellants.

F. F. Moore, for appellees.

DAILEY, J.—This action was brought by the appellees Boswell Ward, Marion Ward and Clair S. Dearborn, doing business under the firm name of "Ward Brothers," to collect a note, and reform and foreclose a mortgage given to secure the payment of the note.

The complaint was filed January 12, 1892, and it charges substantially as follows:

That on July 3, 1891, defendant William W. Wilds executed to plaintiffs his promissory note, due in ninety days, for $325; that at the time said Wilds was the owner, in fee, of lot 42, in block 34, in the original plat of the town of Kirklin, in said county; that on said day said defendant promised and agreed with plaintiffs to execute to them a mortgage on said real estate to secure the payment of said note; that in pursuance of said agreement the defendant Wilds executed a mortgage, a copy of which is filed herewith and made a part hereof; that by mistake of the scrivener who drew said mortgage, the description contained therein, to wit: "One one-story frame building store room, situate on lot number forty-two, in block number thirty-four, in the original plat of the town of Kirklin," was inserted instead of the one first above set out, and which was intended to be inserted by the plaintiffs and defendant; that by said mutual mistake of the parties, said mortgage was executed, delivered and accepted by said erroneous description, believing it to contain the correct description, and that said erroneous description was not the one intended by the parties thereto.

It also charges that defendant (appellant) Jesse S. Reagan, held a mortgage on said lot 42, which was made

after plaintiffs' mortgage, and, because of the allegations above set forth, was junior to plaintiffs' mortgage.

Upon these allegations, with such formalities as are necessary to make a good complaint on note and foreclosure of the mortgage, the plaintiffs came into court.

To this complaint the defendants joined issue by a general denial. The cause was tried by the court, and it rendered a personal judgment against the defendant Wilds for $385.59, being the amount of the principal, interest and attorney's fee due on said note, without relief from valuation or appraisement laws; that the mortgage be foreclosed as against the defendants and all persons claiming under or through them in and to the following property, to wit: "The one story frame building store room, situated on lot number forty-two (42), in block number thirty-four (34), in the original plat of the town of Kirklin, Clinton county, State of Indiana," and so much of said lot as is occupied and covered by said building, together with so much of said lot as is and shall be appropriate and essential to the use of said building as a place for a sale of merchandise with the right of ingress and egress.

The court further found and adjudged that the lien or claim of the defendant Jesse S. Reagan, on the above described real estate and easement, is junior and subaltern to the lien of the plaintiffs thereon.

The appellants assign two errors, but no objection is made by them to the judgment and decree of the court, except so much of it as affects lot 42, in block 34, in the original plat of the town of Kirklin. That is, they do not assail the personal judgment or decree of foreclosure as to the building upon the lot, but they seek to contest so much of the decree as in any wise affects the real estate in controversy.

The portion of the complaint attempting to subject the

real estate on which the building is situate to the payment of this debt, proceeds upon the theory of reformation; that it was the intention of all the parties to mortgage the lot in question, but by their mutual mistake it describes and includes only the building upon the lot.

After the trial was had, the court being of the opinion that there was no ambiguity in the mortgage, no correction of it was made. The relief sought by the plaintiffs, in this particular, was, in effect, denied, but the court, acting upon the theory, from the language of the mortgage, that it was the plain intent of all parties concerned that so much of the lot should pass with the mortgage of the building as was essential to its use, entered a decree of foreclosure, not of the building alone, nor of the lot and building, but so much of the lot as the building stands upon, and sufficient for means of ingress and egress, and that which is essential to the use of the building as a place for the sale of merchandise, together with the building.

It is contended by the appellants, that either the plaintiffs, under the theory taken by them in the case, were entitled to a judgment correcting the mortgage and a foreclosure against the lot which they alleged it was intended to cover, or they were bound by the terms of the mortgage and were entitled to a foreclosure of the mortgage on the building only. As the appellees failed to get the mortgage in suit reformed, but succeeded in getting a foreclosure of the mortgage without reformation, this termination of the cause, the appellants insist, was outside the issues and reversible error. It seems that the real estate affected by the judgment of the court is a part of the lot sought to be included in the foreclosure, and is a portion of the real estate set out in the unreformed mortgage. This being so, the judgment is not outside the issues, if the force of the language contained in the

instrument is sufficient to entitle the plaintiffs to the relief they ask without reformation. A judgment is not open to this objection, because it does not give all the relief asked, if what is given is justified by the facts alleged and proven where evidence *aliunde* is admissible to show what was meant. Viewed in connection with the issues tendered in this action, the judgment simply indicates a failure of proof on the point upon which reformation was sought, and not that there was an abandonment of any theory. The query is, was there a finding outside the issues?

Appellants' learned counsel say: "A careful examination of the evidence adduced at the trial shows that the plaintiff sought his relief at the trial upon the challenge in his complaint, but there is no finding by the trial court of mistake and no judgment correcting a mistake and giving the plaintiffs the relief they sought."

This language is an admission that the evidence was germane to the issue, but insufficient to entitle the appellees to all the relief asked. Was it sufficient for the relief granted? It is too well settled to admit of doubt that buildings may be treated as personal property and mortgaged, sold and moved accordingly, and that they may be the subject of mortgage without including the land upon which they are situate.

In the absence of a finding and judgment by the trial court that there was a mistake and the plaintiffs should have their mortgage corrected so as to conform to the mutual intention of the parties, such intention must appear from the language of the instrument in question. If the language of the instrument to be construed is of such a nature that different constructions could be placed upon it, then it, of itself, offers something for the court to interpret.

In *Indianapolis, etc., R. W. Co.* v. *First Nat'l Bank,*

etc., 134 Ind. 127, it is said: "When a building is erected, *prima facie*, it is a part of the land upon which it stands, and, in order to rebut the presumption of law, a state of facts must be shown to take it out of the operation of the general rule."

In *Endsley* v. *State*, 76 Ind. 467, this court held a criminal information sufficient which charged the unlawful, violent, and forcible detention of a dwelling house, for the reason that such a structure necessarily partakes of the nature of real estate. A deed describing the property as "the storehouse wherein A. B. had a store, now occupied by him as a postoffice, with the outhouse and office adjoining," was held to convey also the lot on which the houses were situated, there being nothing in the description to exclude the lot. *Wise* v. *Wheeler*, 6 Ired. 196.

In this case there is no conflict in the evidence save on the question of a mistake, and if there were conflict, this court will leave it to the lower court to decide whom to believe. If the evidence introduced was competent under the issues, and if the finding of the court was within the evidence, there is no variance. Evidence that the property mortgaged was personal property was competent under the issues tendered by the complaint, and a showing to that effect would have denied any intention to mortgage lot 42 in block 34, or any part of it. In our opinion the mortgage of the building, in the absence of language indicating a different intention on the part of the mortgagor, passed such an interest in the land on which it rested as was essential to its use and enjoyment.

The mortgage in question, among other things, states that "William W. Wilds * * * mortgage and warrant to Ward Brothers * * * the following real estate * * * to wit: describing the premises, without in any wise limiting the estate conveyed. It seems to be the law

that the intention to pass such an interest in the land on which the building stands as is essential to its use and enjoyment, is implied where no other one is manifest or proven. But, independent of inferences, we think the intention to treat the subject as real estate is clear. The form used is that of a real estate mortgage—the subject of the mortgage is "real estate," and this "real estate" is mortgaged and warranted—the grantor styles himself an "unmarried" man. None of this is appropriate to the hypothecation of personal property. When an absolute interest is intended to be conveyed, general terms only need be used. *Johnson* v. *Raynor*, 6 Gray (72 Mass.) 107.

Here the terms employed are general, usual and unrestricted. If the intention had been to convey anything less than the things essential to the use and enjoyment of the building as real estate, it should have been expressed by appropriate terms. It appears, therefore, that the intention to grant the storehouse was not the sole aim of the parties; that it was not the purpose to give it a mere temporary resting place, but a position where it might be used and enjoyed forever.

In our opinion the appellees are entitled to the judgment entered in this case by virtue of the terms of the mortgage as executed, and are not confined in their remedy to the building with the right to remove it from the premises.

We think the judgment of the lower court should be, and it is, in all things affirmed.

Filed June 19, 1894.

138 380
159 295

No. 17,210.

SIMMONS *v.* VANDYKE ET AL.

FUGITIVE.—*Arrest and Detention Upon Telegram.—Habeas Corpus.—Insufficient Return.*—To a writ of *habeas corpus* directed against a police officer and the county sheriff, the defendants made return that the police officer arrested the petitioner and delivered him into the custody of the sheriff for commitment; that he did so upon a telegram from H., the chief of police of Portland, Oregon, to the effect that the latter held a warrant for the petitioner upon a charge of forgery, and directing the arrest; that after the arrest H. sent to the officer, by telegraph, a copy of a warrant issued to and held by H. for the petitioner's arrest; that H. had sent a further telegram that he had started, with proper papers, for the petitioner; that defendants believed the petitioner guilty of said crime, made the arrest in good faith and believed that H. was en route to procure the petitioner's extradition.

Held, that the return is bad.

From the Madison Circuit Court.

W. S. Diven, B. McMahan, J. W. Lovett and *H. C. Ryan*, for appellant.

E. D. Reardon, J. R. Thornburgh, M. P. Turner and *B. H. Campbell*, for appellees.

HACKNEY, C. J.—The appellant sought to be released from custody and confinement in the county jail, and filed, in the lower court, his petition for the writ of *habeas corpus*, alleging that the appellees William Vandyke, sheriff of Madison county, and George Welker, a policeman of the city of Anderson, had arrested the appellant and held him in custody without warrant or legal charge or authority, but upon a pretended charge of forgery in the State of Oregon, and pursuant to the direction of the chief of police of Portland, Oregon, communicated by telegraph; that he had not committed any crime, nor had he been charged with the commission of

any crime in this State, and that his arrest had not been ordered by any court or officer of this State.

The appellees made separate returns to the writ, but, by agreement, the returns were considered as joint. By said returns, it appeared that Welker was a police officer, and, as such, took the appellant into custody and delivered him into the custody of Vandyke, as sheriff, for commitment; that he did so upon a telegram received from one Hunt, chief of police of Portland, Oregon, to the effect that he held a warrant for appellant upon a charge of forgery, and directing the arrest; that after the arrest, said Hunt sent to Welker, by telegraph, a copy of a warrant issued to and held by him, said Hunt, for the arrest of appellant; that Hunt had sent a further telegram that he had started, with proper papers, for Simmons; that appellees believed appellant guilty of said crime and made said arrest in good faith, and that they then believed said Hunt en route to Anderson to procure the extradition of the appellant. The court overruled exceptions to the returns, and that ruling presents the assigned errors.

The appellees have not aided us with any brief, argument or citation of authority, and we find no statutory authority for making the arrest and detaining the appellant upon the facts stated in the petition and returns. Fugitives from justice from one county in this State to another county in this State may be apprehended by proceedings as provided in section 1667, R. S. 1894 (section 1598, R. S. 1881), and fugitives from another State into this State may be arrested, detained and returned upon demand of the executive authority of the State from which the criminal is a fugitive, upon warrant and upon identification as required by section 1668, *et seq.*, R. S. 1894 (section 1599 *et seq.*, R. S. 1881).

It is manifest that no authority for the arrest and de-

tention under consideration is found in the provisions cited, nor can it be said that the arrest was made upon view, by the officers, of the commission of a crime.

The act of February 12, 1838, R. S. 1838, p. 319, authorized proceedings before certain judicial officers of this State, upon which arrests of fugitives from other States were permitted and their detention directed. That act passed into the R. S. 1843, p. 1030, but has not been included in any subsequent revision. We do not inquire if said act is now in force, since there is no pretense that the arrest and detention in this case were made pursuant thereto.

At common law, peace officers have the power to arrest upon information of the commission of a felony, and without a warrant, and do not do so at the peril of proving the commission of the felony. *Doering* v. *State*, 49 Ind. 56; 1 Am. and Eng. Encyc. of Law, p. 732, section 2.

In re Fetter, 3 Zabriskie (N. J.), 311, 57 Am. Dec. 328, it was held that under article 4, section 2, of the Constitution of the United States, the power to arrest and detain a fugitive, until the authorities of the State whose laws had been offended against could make the demand in said section provided, was implied. It was said: "The denial of the power to arrest and detain an offender until the demand for his surrender be actually made, would, it is manifest, render the provision of the constitution well nigh nugatory. If a person committing murder, robbery, or other high crime in one State, may, by crossing a river, or imaginary line, avoid arrest or detention until an executive requisition and order for his surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfillment of the requirements of the constitution, all require that the arrest and detention of the

offender, be made wherever he may be found, preparatory to a demand and surrender.'' As supporting this power, are cited *People* v. *Schenck*, 2 Johns. *479; *In re Goodhue*, 1 Wheel. Cr. Cas. 427; *Commonwealth* v. *Deacon*, 10 Serg. & R. 125.

We have no doubt that the exercise of the power of detention does not rest wholly with the officer making the arrest, and that he should, within a reasonable time, take the prisoner before a circuit, criminal or other judicial court and take the judgment of commitment from such court upon complaint in writing, submitting an inquiry as to the presumption of guilt and the good faith of the officer. *In re Heyward*, 1 Sandf. 701; *In re Leland*, 7 Abb. Pr. (N. Y.) 64; *Ex parte Cubreth*, 49 Cal. 435.

In this case the appellant was not committed or detained upon such an inquiry, and, whether our courts possess the jurisdiction by statute or by implication is not before us, though the holding of some of the courts seems to imply that jurisdiction. *State* v. *Buzine*, 4 Harr. (Del.) 572; *In re Washburn*, 4 Johns. Ch. *106; *In re Leland, supra; In re Rutter*, 7 Abb. Pr. 67.

In re Henry, 29 How. Pr. 185, was a case in many respects like the present, and it was there said:

''On the return of the writ no affidavits nor any other proof of the alleged larceny have been furnished, but all the information afforded rests in letters unauthenticated except by the signature of the chief of police of Chicago, and the telegraphic dispatches purporting to come from him, the last dispatch indicating that a requisition has been finally obtained.

''Under these circumstances, I am reluctantly compelled to grant his discharge. The officers were undoubtedly authorized to make the arrest. The rule is that a private person even may arrest a party, if a

felony has in fact been committed, and there was reasonable ground of suspicion; but in the case of an officer, he is justified in making an arrest if no felony was in fact committed, if he acted upon information from another on which he had reason to rely.

"This is the well settled rule in the English courts, sanctioned and followed in this State in the case of *Holley* v. *Mix* (3 Wend. 350). In such case the officer acts ministerially, and is entirely justified in making the arrest, and it is a power very important to be exercised to prevent the immediate escape of felons. But he has another duty to perform. In the case where the arrest is made under a warrant, the officer must take the prisoner without any unnecessary delay before the magistrate issuing it, in order that the party may have a speedy examination if he desires it; and in the case of an arrest without warrant, the duty is equally plain, and for the same reason, to take the arrested party before some officer who can take such proof as may be afforded, or if the circumstances will justify it, hold the suspected party for further examination. (*Pratt* v. *Hill*, 16 Barb. 307).

"If this is not done with reasonable diligence, the party arrested can apply for a *habeas corpus*, calling on the officer to show cause why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded (2 Inst. 52.) No such proof has been exhibited to me. The original grounds of suspicion indeed remain, and may be deemed presumptively strengthened by the last dispatch, but they contain no element of proof in the legal sense, and would not authorize me to detain him."

The value of personal liberty is too great to permit the detention of a suspected fugitive upon the judgment

of a ministerial or peace officer, and without a hearing judicial in character. The inquiry by the circuit court in this case was not extended to an investigation of the cause for detention beyond that stated in the return, and its judgment remanding the appellant was upon the exceptions to the return, and not upon an independent inquiry by the court.

We have felt the loss of that aid which should have been given us by the appellees in a brief in this case, but are equally at a loss to observe the theory upon which the appellant was committed.

The judgment is reversed with instructions to the circuit court to sustain the appellant's exceptions to the return to the writ of *habeas corpus*.

Filed June 22, 1894.

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138 385
139 176

138 385
152 64

No. 16,875.

Booker et al. *v.* Tarwater.

Deed.—*Conveyance to Grantee's "Heirs."—When Void for Uncertainty.*—A deed purporting to convey real estate "to Francis Carrico's heirs," Francis Carrico being alive, is, in the absence of words showing that the grantor intended the term "heirs" to mean "children," void for uncertainty, and upon the death of the grantor, without further alienation, the real estate descends to his heirs.

From the Sullivan Circuit Court.

W. C. Hultz, *W. R. Nesbit*, *J. T. Beasley* and *A. B. Williams*, for appellants.

J. S. Bays, for appellee.

McCabe, J.—The appellants sued the appellee for partition of real estate situate in Sullivan county. Upon

the issues formed there was a trial by the court without a jury; and upon proper request the court made a special finding of the facts; and stated its conclusion of law in favor of the appellee, whereon he had judgment. It is contended that the court erred in its conclusion of law, and this is the only error assigned.

The substance of the special finding is that on January 24, 1865, Bazzle Carrico was the owner in fee-simple of the land in controversy (describing it), and that his wife Frances was living at the time; that at that time they had a son living named Francis Carrico who had three children living, named respectively, Mary J., Truston, and Frankie, aged six, four and one year, then living with their father; that on that day said Bazzle and wife made a deed purporting to convey said real estate "to Francis Carrico's heirs," which deed was duly acknowledged and filed in the proper recorder's office on the same day, by whom it was so filed being undisclosed, and it was recorded August 9th, 1867; that when said deed was so left in the recorder's office said Francis Carrico and his family, consisting of his three infant children and wife, their mother, moved upon and took possession of said lands and farmed the same, cleared parts thereof and continued to so occupy the same until April 5, 1869; that Truston Carrico died in 1875 intestate, leaving surviving him as his only heirs at law his father and mother, said Francis Carrico and wife, and his sisters, Mary J., and Frankie; that on September 5, 1875, said Mary J. Carrico intermarried with Henry Booker, and is the Mary J. Booker who is one of the plaintiffs (appellants); that said Frankie, on August 16, 1884, intermarried with the plaintiff, Robert Whitlock, and they had born to them as the only issue of said marriage one child, viz: Lizzie Whitlock, one of the plaintiffs, appellants herein; that said Frankie died in-

testate at said county in 1890, leaving as her only heirs said Robert, surviving husband, and said child Lizzie; that said Mary J., Robert and Lizzie have not, nor have either of them, conveyed any interest in said real estate to any person or persons; that on April 5, 1869, said Francis Carrico, son of said Bazzle, claiming to be the owner of said lands by virtue of said deed from said Bazzle Carrico and wife to the heirs of said Francis Carrico, executed a warranty deed, his wife joining therein, for a valuable consideration, purporting to convey said lands to Josiah Carrico, who went into possession and occupied, claiming title to said land under said deed until February 10, 1870, when he and his wife executed a warranty deed purporting to convey the same to Fountain Land; that said Land went into possession, claiming title under said deed until the 13th day of November, 1872, when he executed a warranty deed, his wife joining therein, purporting to convey the same to Josiah Carrico for a valuable consideration; that said Josiah Carrico went into possession and occupied said land under said last mentioned deed, claiming title thereunder until the 26th day of September, 1874, when he executed a deed to John Crance, his wife joining therein, purporting to convey said lands to said Crance for a valuable consideration; that said Crance went into possession and occupied, claiming to own the same by virtue of said deed, until the 23d day of August, 1875, on which day he made a warranty deed, his wife joining therein, purporting to convey said lands to William G. Carrico for a valuable consideration; that he went into possession, occupied and claimed to be the owner of said land by virtue of said deed until the 13th day of June, 1879, when he made a quitclaim deed, his wife joining therein, purporting to convey said lands to William A. Neal for a valuable consideration; that said Neal went into pos-

session thereof, and while in possession he caused an abstract of title to said lands to be made, and said Neal was advised that he did not have a good title legally to said lands by virtue of said deed, because the deed of Bazzle Carrico and wife to the heirs of said Francis Carrico was void; that said Neal thereupon, pursuant to the advice of his attorney, for the purpose of perfecting his title to said lands and securing a good legal title thereto, procured all the legal heirs of said Bazzle Carrico, then deceased, excepting Andrew L. Carrico, James H. Carrico, Sarah E. Purcell, and Francis Carrico, to execute quitclaim deeds purporting to convey their undivided interests in said lands to said Neal; that, further, to complete and perfect his legal title to said lands said Neal, on the 13th day of June, 1879, instituted a suit against said Andrew L. Carrico, James H. Carrico and Sarah E. Purcell, heirs at law of Bazzle Carrico, deceased, in the Sullivan Circuit Court, said Neal claiming and alleging in his complaint in said suit that he and the said Andrew L. and James H. Carrico and Sarah E. Purcell were the owners of all said lands as tenants in common, the said Neal, the owner of $\frac{3}{4}\frac{9}{2}$ thereof in fee, as purchaser thereof from the heirs of said Bazzle Carrico, and each of the then defendants the owner of $\frac{1}{4}\frac{}{2}$ part thereof in fee as heirs of said Bazzle Carrico, deceased; that such proceedings were had in said suit that said court adjudged said facts to be true as alleged in said complaint, and that said lands could not be divided without injury to the owners thereof, and the same were sold under the order of the court to said Neal by a commissioner appointed by the court for that purpose, who executed a deed pursuant to said sale, which was approved and confirmed by the court. And said Neal thereupon continued in possession, occupied and claimed to own said lands by virtue of his deeds from William G.

Carrico as remote grantee of Francis Carrico, an heir of said Bazzle Carrico, from the other said heirs and widow of said Bazzle, deceased, and from said commissioner until the 22d of January, 1880, when he, said Neal, executed a warranty deed, his wife joining therein, purporting to convey said lands to John H. Driver, who took possession, occupied the same under claim of ownership by virtue of said deed from said Neal until the 30th day of May, 1882, when he executed a like deed to another, who, in like manner, took possession under said deed and occupied, claiming to own said lands by virtue thereof, and thereafter, through numerous mesne conveyances from said Neal, each grantee going into possession under claim of ownership until the 21st day of August, 1891, the then holder under said mesne conveyances executed a warranty deed purporting to convey said lands to the appellee, William Tarwater for a valuable consideration, who also took possession under said deed, and now holds possession of said lands, claiming title thereto by virtue of said deed; that each and all of said deeds were duly recorded in the recorder's office of said county within the time allowed by law therefor; that said Bazzle Carrico died in said county in 1870, and that said Francis Carrico had no grandchildren living on January 24, 1865, and no other children living than said Mary, Truston and Frankie; that said Truston at no time conveyed any interest in said lands; that said Francis Carrico died in 1886, intestate.

The conclusion of law stated upon these facts is: "That the defendant (the appellee) is the owner of the lands set out and described in the complaint, and entitled to the possession thereof, and that the plaintiffs (the appellants) take nothing by their complaint herein."

The question that lies at the threshhold of the case is, whether the deed from Bazzle Carrico to "Francis Carri-

co's heirs'' conveyed any interest in the land to anybody. Strange as it may seem, counsel for appellants simply assert in their brief that "The deed from Bazzle Carrico to 'Francis Carrico's heirs,' of date January 24, 1865, conveyed the lands in controversy to Francis Carrico's children.'' No authority is cited to support this proposition, nor is there any attempt to support it by argument.

Appellee's counsel seems to take it for granted that such a deed is valid, and effectual to convey title to the children of Francis Carrico, and seeks to support the conclusion of the trial court on the sole ground of adverse possession under claim of ownership in appellee and his grantors for more than twenty years prior to the commencement of the action. Ordinarily, twenty years after the right of action accrues for the possession of real estate, under the twenty years' statute, is a complete bar to such action, without such possession having been adverse. R. S. 1881, section 293; 1 Burns' R. S. 1894, section 294; *Vanduyn* v. *Hepner*, 45 Ind. 589.

But it has been held by this court that such defense does not apply to an action for partition. *Peden* v. *Cavins*, 134 Ind. 494; *McCray* v. *Humes*, 116 Ind. 103.

It has also been held by this court that twenty years' adverse possession not only bars the action for possession, but also confers as complete a title as a written conveyance, even against a tenant in common, where the tenant in possession denies the right of his cotenant and asserts a hostile title. *Bowen* v. *Preston*, 48 Ind. 367, and cases there cited.

The theory of the appellants is, we presume, that the deed to Francis Carrico's heirs vested the title in his three children, and one of them, Truston, having died in 1875, in infancy, unmarried and without lawful issue, one-half of his third of the land descended to his

father, Francis, and that thereupon the warranty deed previously executed by said Francis, by which he attempted to convey the whole of said lands to Josiah Carrico, enured to the benefit of said Josiah, vesting in him, by estoppel, that undivided one-sixth of said lands, and so on with each successive grantee down to the appellee.

It is settled law that by virtue of a warranty deed to the grantee, his heirs and assigns may, by estoppel and direct operation of law, become vested with a title acquired by the grantor after the execution of the deed. 19 Am. and Eng. Encyc. of Law, 1020, 1021, 1022, and numerous authorities there cited; *Hannah, Admr.*, v. *Collins*, 94 Ind. 201; *Locke* v. *White*, 89 Ind. 492; *Avery* v. *Akins*, 74 Ind. 283.

Whether this is the way appellants conclude that the appellee became clothed with the $\frac{4}{24}$ parts, which is one-sixth of said lands, their counsel have not seen fit to inform us. But we see no other way by which appellee can have any interest in said lands, if appellants' assumption is correct, that the deed to Francis Carrico's heirs clothed the appellants with title, unless adverse possession for twenty years clothed appellee with the whole title. But it seems to us that appellants have been altogether too generous in conceding to appellee the ownership of the one-sixth or any other portion of these lands if the deed to Francis Carrico's heirs vested the title thereto in his children.

Assuming that it did so vest the title, and conceding that the warranty deed of Francis Carrico to Josiah Carrico, attempting to convey to the latter the whole of the lands, in 1869, enured to the benefit of said Josiah and his grantees, on the death of Truston, one of the children of Francis, by which one-half of Truston's third descended to his father, said Francis, yet such principle could operate no further than the deeds in the chain of

title continued to be deeds containing covenants of warranty or warranty deeds. The deed from Josiah Carrico to John Crance is not shown to be a warranty, and the same is true of the deed from William G. Carrico to William A. Neal. A deed must be shown to be a warranty deed, affirmatively, before it can be held to operate as a transfer of an after acquired title. *Nicholson* v. *Caress*, 45 Ind. 479.

A quitclaim deed can not have that effect. *Avery* v. *Akins*, *supra*; *Graham* v. *Graham*, 55 Ind. 23; *Shumaker* v. *Johnson*, 35 Ind. 33.

If the special finding is correct and full, and appellants, by excepting to the conclusion of law, admit that it is so, and if their assumption that the deed from Francis Carrico's heirs vested in them title to the land, then they had no cause for partition against the appellee, for he owned no part nor interest in the land unless he owned it all by twenty years' possession by himself and grantors. If he owned it all by twenty years' possession, then the appellants had no cause for partition against him. If he did not own it all by twenty years' occupancy, and appellants' assumption be correct as to the effect of the deed of Bazzle Carrico, then appellants had no cause for partition against appellee, but rather a cause of action for possession.

As before observed, that action is easier defeated by twenty years' continuous possession than it is to defeat a suit for partition by such possession. That may account for the seeming too great generosity of appellants in planting their suit on the theory that appellee owned one-sixth interest in the land and asking partition instead of bringing an action for possession.

The conclusion we shall reach as to the effect of the deed from Bazzle Carrico, makes it wholly unnecessary to decide whether the facts found make a case of twenty

years' adverse possession in appellee and his grantors, thereby vesting in him title, and what effect his grantor's purchase of the supposed outstanding title from the widow and heirs of Bazzle Carrico had upon the adverse character of such possession as against appellants, so ably presented in their brief; nor need we decide whether the facts found make a case of no tenancy in common, and hence whether the twenty years' statute of limitations applies and bars all right of appellants. If the deed from Bazzle Carrico to Francis Carrico's heirs was not effectual to convey title, then the title remained in Bazzle, and, at his death, descended to his heirs, his widow and children, and if that is the case, the appellee's remote grantor, William A. Neal, as the special finding shows, purchased and received conveyances through deeds from the adult heirs and by a partition sale and conveyance of the interests of the minor heirs of said Bazzle in and to all of said lands. At all events it is sufficient to say that if that deed was invalid then appellants have got no title, and have no right to complain no matter what the conclusion was.

It was held by this court, in *Winslow* v. *Winslow*, 52 Ind. 8, that a deed to the heirs of a living person to take effect immediately, exactly such a deed as the one here involved, was void.

In *Lyles* v. *Lescher*, 108 Ind. 382, ELLIOTT, J., speaking for the court, seriously doubted the correctness of the decision in *Winslow* v. *Winslow*, *supra*, remarking that some of the authorities on which it was founded had since been overthrown, and others were not in point, but left the question open for future consideration without deciding it.

Afterwards, in *Outland* v. *Bowen*, 115 Ind. 150, MITCHELL, J., in speaking for the court, directly affirmed the doctrine of *Winslow* v. *Winslow*, *supra*.

In the still later case of *Tinder* v. *Tinder*, 131 Ind. 381, it was held, by ELLIOTT, J., speaking for the court, that this court was committed to the doctrine laid down in *Winslow* v. *Winslow*, *supra*, the court saying: "But while it may be true that we are committed to the rule stated, it is also true that the court has manifested a purpose to restrict rather than enlarge its operation." Citing *Lyles* v. *Lescher*, *supra*.

The court then goes on to hold that where there are any other words in the deed from which it may be inferred that the grantors did not use the word heir or heirs in its strict technical legal sense, or that indicate that children were thereby intended, then the rule does not apply, and that effect will be given to the apparent intent. But here there are no other words in the deed to indicate any other intention on the part of the grantor than that he used the word "heirs" in its strict legal sense. He may have meant children, and he may have meant heirs. This makes it wholly uncertain as to who the grantees were. If he had used words in addition indicating that he meant children by the word "heirs," that would have been certain enough, but he might have meant heirs in the legal signification of the word. If he did, then in addition to the fact that a man can not have heirs while he lives, it would always remain a matter of great uncertainty who the man's heirs would be until he dies. So that if he meant heirs in the legal signification of the word, it was void for uncertainty, and because he could have no heirs while he lived. But, as we do not know whether he meant heirs, in the legal signification of the word, or children, the deed is equally void for uncertainty in the grantee.

It follows from what we have said, that the legal title to the lands in controversy was conveyed to the appel-

lee, and that the appellants have no title whatever, and the conclusion of law to that effect was correct.

The judgment is affirmed.

Filed June 20, 1894.

No. 17,152.

THE STATE, EX REL. SMITH, ATTORNEY-GENERAL, *v.* MCCLELLAND, TRUSTEE, ETC.

CONSTITUTIONAL LAW.—*Unexpended Balance of School Revenue in Hands of School Corporations.—Act of March 3d, 1893.—Statute Construed.*—The act of March 3d, 1893 (Acts 1893, pp. 195–6), providing "that any school corporation not expending the sum total of the tuition revenue apportioned to it by the State, shall, on the first Monday in July annually, report to and return to the county treasurer of the county in which said school corporation is situated, the unexpended balance of tuition revenue from said source in excess of $100, and the county auditor of said county shall include all such unexpended balances in his report to the State Superintendent of Public Instruction, as revenue collected in his county and ready for distribution at the next apportionment," and providing a penalty, is constitutional and valid.

SAME.—*Validity of Act.—Scope of Consideration.*—With the justice, the propriety, the policy, the advisability or desirability of a statute, the courts can have nothing whatever to do, so long as the act does not infringe some provision of the constitution, State or Federal, or some valid treaty or law of Congress.

COMMON SCHOOLS.—*School Revenue.—Distribution.—Control and Title Remain in the State.—School Corporations Agents of the State.*—The distribution of school revenue to the school corporations of the State does not change the title or ownership of the money. The persons to whom the money is entrusted, and to whom it is delivered, hold it as the agents of the State, and the State does not lose its control over it until it is paid out for tuition purposes.

PARTIES.—*Plaintiff.—State, ex rel. Attorney-General.—School Revenue.—Unexpended Balance.—Township Trustee.—Action.*—An action to recover the unexpended balance of tuition revenue, in excess of $100, in the hands of a township school trustee, which he has neg-

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lected or refused to pay over to the county treasurer, is properly brought in the name of the State on the relation of the Attorney-General.

DEMURRER.—*Defect of Parties Defendant.—Failure to Designate Proper Parties.—Waiver.*—Where a demurrer on the ground of defect of parties defendant does not designate the proper parties, the demurrer is insufficient in form, and the objection is thereby waived.

From the Marion Circuit Court.

A. G. Smith, Attorney-General, *A. Zollars* and *L. O. Bailey*, for appellant.

W. N. Harding, *A. R. Hovey*, *J. Morris*, *R. C. Bell*, *J. M. Barrett* and *S. L. Morris*, for appellee.

MCCABE, J.—This action was brought by the State of Indiana, on the relation of the attorney-general, for the purpose of recovering a balance of $322.05 of State school revenue for tuition, which was unexpended and in the hands of appellee on the first Monday of July, 1893, left over from the State tuition revenue apportioned to said township for the year ending the day previous, and which it is stated appellee has refused and neglected, and still refuses and neglects to refund and pay over to the treasurer of Marion county, though often requested so to do. The charge in the complaint was that the tuition revenue received by appellee, from all sources, had been commingled and expended from as an entirety. The suit was commenced under the proviso of the act of March 3d, 1893 (Acts 1893, pp. 195–6). The act is an amendment of section 114 of the school law of 1865, R. S. 1881, section 4482.

The proviso reads as follows: "*Provided, however*, that any school corporation not expending the sum total of the tuition revenue apportioned to it by the State, shall, on the first Monday in July annually, report to and return to the county treasurer of the county in which said school corporation is situated, the unexpended balance of

tuition revenue from said source in excess of $100, and the county auditor of said county shall include all such unexpended balances in his report to the State Superintendent of Public Instruction, as tuition revenue collected in his county and ready for distribution at the next apportionment. Any township school trustee or treasurer of the board of school trustees of incorporated towns and cities refusing or neglecting to refund the said unexpended balance of tuition revenue as herein provided, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than double the amount so withheld."

The action was begun by filing a petition praying for an alternative writ of mandate to compel the appellee, as trustee of Wayne township, in Marion county, to pay over to the treasurer of said county the sum above mentioned for redistribution by the State Superintendent of Public Instruction. The alternative writ stating the above recited facts was duly issued. The appellee appeared and demurred to the writ on the ground, 1st, that the same showed that appellant, the attorney-general, had no legal capacity to sue; 2d, that there is a defect of parties defendant; 3d, that the writ does not state facts sufficient to constitute a cause of action.

The circuit court sustained the demurrer, to which the appellant excepted, and failing to plead further, the appellee had judgment upon the demurrer.

It is made the duty of the attorney-general, by statute, to institute and prosecute all necessary proceedings for the collection of all moneys where the same is by law required to be paid to the State, or any officer in trust for the State, and in all cases where the officers, whose duty it shall be to collect the same, shall fail, neglect, or refuse, after a cause of action in favor of the State shall have accrued. Elliott's Supp., section 1805.

It was held by this court, in *Board, etc.*, v. *State, ex rel.*, 92 Ind. 353, that the attorney-general was the proper relator in a suit to recover moneys belonging to the common school fund of the State. To the same effect are *Board, etc.*, v. *State, ex rel.*, 116 Ind. 329, and *Board, etc.*, v. *State, ex rel.*, 122 Ind. 333.

If, therefore, the unexpended balance of the tuition revenue apportioned for the previous year to Wayne township, in Marion county, by the State, in excess of $100, which the writ states amounts to $322.05, and the truth of which is admitted by the demurrer, belongs to the common school tuition revenue of the State, and a valid law of the State requires the trustee of the township to pay said amount to the treasurer of the county, and he has failed, neglected, or refused to so pay over, the action is properly brought on the relation of the attorney-general. It will be observed that the statute above quoted requires, in such cases, such balances to be returned and paid over to the county treasurer for redistribution by the State Superintendent of Public Instruction, at the next apportionment of school revenue for tuition. The whole question, therefore, depends upon the validity of that statute, not only as to the legal capacity of the attorney-general to prosecute the action as relator, but also as to the sufficiency of the facts to constitute a cause of action.

The other ground of demurrer, namely, that there was a defect of parties defendant, has been waived by the appellee, in so far as he could waive the same, by failing to argue it in his brief. The judgment being in his favor on the demurrer, the presumption that always prevails in favor of the correctness of the action of the trial court on appeal, would, perhaps, require us to uphold the judgment below if any one of the grounds assigned in the demurrer was well taken, whether appellee pointed

out such objection in his brief or not. But no reason has been suggested why there is a defect of parties defendant in the demurrer, and the law requires such a demurrer to designate the proper parties, and the demurrer failing to so designate such parties, it is insufficient in form. 1 Burns' Rev. 1894, section 342; *Kelley* v. *Love*, 35 Ind. 106. *Vansickle* v. *Erdelmeyer*, 36 Ind. 262; *Marks* v. *Indianapolis, etc., R. W. Co.*, 38 Ind. 440.

The demurrer not being sufficient in form, as to defect of parties defendant, the appellee is in the same situation as if he had not demurred for defect of parties defendant at all. In such case such objection is deemed waived. 1 Burns' Rev. 1894, section 346.

We, therefore, hold that the objection as to defect of parties defendant was waived by the appellee in failing to file a demurrer designating the proper parties defendant. The only question, therefore, left for our consideration and decision is whether the statute in question is constitutional. Almost the entire argument, both oral and in the briefs, on both sides, conducted at great length and signalized by much learning and research, spiced with laudable zeal and marred by not a little animosity, has been devoted to that question as the controlling one in the case. The appellee's counsel have assailed the statute from every standpoint, and have leveled at it many blows that are not constitutional objections. With such objections to a statute, the courts have nothing whatever to do. With the justice, the propriety, the policy, the advisability or desirability or undesirability of a statute, the courts can have nothing whatever to do, so long as the act does not infringe some provision of the constitution, State or Federal, or some valid treaty or law of Congress. Such objections must be made to the Legislature. *Hedderich* v. *State*, 101 Ind. 564; Cooley's Const. Lim., 201–204.

Nor can the courts inquire into the motives of the Legislature in passing an act in order to overthrow the same. Cooley's Const. Lim., 220–222.

No attempt has been made in that direction, in this case, except that the appellee's counsel has characterized the act in question as "a legislative fraud." But, if we shall find it within the power of the Legislature to pass the act, that ends the inquiry.

The State Legislature possesses all legislative power, except such as has been delegated to Congress and prohibited by the constitution of the United States, to be exercised by the States, and such as are expressly or impliedly withheld by the State constitution from the State Legislature. Cooley's Const. Lim., 104.

The only limitations, therefore, upon the power of the Legislature are those imposed by the State constitution, the Federal constitution, and the treaties and acts of Congress adopted and enacted under it. *Hedderich* v. *State*, *supra*.

It, therefore, was said in several cases by this court that "the legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the Federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws." *Beauchamp* v. *State*, 6 Blackf. 299; *Maize* v. *State*, 4 Ind. 342; *Fry* v. *State*, 63 Ind. 552; *Clare* v. *State*, 68 Ind. 17; *McComas* v. *Krug*, 81 Ind. 327; *Campbell* v. *Dwiggins*, 83 Ind. 473.

The sole contention here is that the act is in conflict with the provisions of the constitution of the State.

It was said by this court, in *McComas* v. *Krug*, *supra*, that "Such questions are always regarded by the courts as of serious importance. The judiciary look to the acts of the Legislature with great respect, and reconcile and

sustain them, if possible. The General Assembly is the immediate exponent of the popular will,—expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the constitution, is not to be lightly indulged. That the act is imperfect or impolitic, is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the courts, it must be clearly subversive of the constitution."

And, in *Jamieson* v. *Indiana, etc., Gas Co.*, 128 Ind. 555 (568), it was said: "We have no right to presume that the Legislature usurped power, or disregarded the organic law. No precedent will justify such a presumption, nor any reason sustain it. A party who asserts that the Legislature has usurped power, or has violated the constitution, must affirmatively and clearly establish his position. Nor have the courts the right to so construe a statute as to render it void, where a construction that is reasonably admissible will uphold it. * * * We are to resolve doubts in favor of the validity of the statute, without * * stopping to inquire what construction might be warranted by the natural import of the language used."

And, in *Robinson* v. *Schenck*, 102 Ind. 307 (319), this court said: "It devolves upon the party who assails a statute on the ground that it violates the constitution to show a clear violation and to point out the provision violated; failing in this, his attack is unavailing."

It is claimed by the appellee, that the act in question violates the 8th article of the constitution, in that it operates to make an unequal distribution of the school revenue for tuition among the several school corporations of the State according to the number of school

children in each, but what particular section thereof is supposed to be violated, appellee's counsel have not very definitely stated or pointed out. Said article 8 reads as follows:

"*Common Schools.* 1. Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.

"*Common School Fund.* 2. The common school fund shall consist of the congressional township fund, and the lands belonging thereto; the surplus revenue fund; the saline fund, and the lands belonging thereto; the bank tax fund, and the fund arising from the one hundred and fourteenth section of the charter of the State Bank of Indiana; the fund to be derived from the sale of county seminaries, and the moneys and property heretofore held for such seminaries; from the fines assessed for breaches of the penal laws of the State, and from all forfeitures which may accrue; all lands and other estate which shall escheat to the State for want of heirs or kindred entitled to the inheritance; all lands that have been, or may hereafter be, granted to the State; where no special purpose is expressed in the grant, and the proceeds of the sales thereof, including the proceeds of the sales of the swamp lands granted to the State of Indiana by the act of Congress of the 28th of September, one thousand eight hundred and fifty, after deducting the expense of selecting and draining the same; taxes on the property of corporations, that may be assessed by the General Assembly for common school purposes.

"*Principal, a Perpetual Fund.* 3. The principal of the

common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever.

"*Investment and Distribution.* 4. The General Assembly shall invest, in some safe and profitable manner, all such portions of the common school fund as have not heretofore been intrusted to the several counties; and shall make provision, by law, for the distribution, among the several counties, of the interest thereof.

"*Reinvestment.* 5. If any county shall fail to demand its proportion of such interest for common school purposes, the same shall be reinvested for the benefit of such county.

"*Counties,—Liability.* 6. The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon.

"*Trust Funds Inviolate.* 7. All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.

"*Superintendent of Public Instruction.* 8. The General Assembly shall provide for the election, by the voters of the State, of a State Superintendent of Public Instruction, who shall hold his office for two years, and whose duties and compensation shall be prescribed by law."

Counsel for appellee point out the fourth and fifth sections of the above article, which they claim are violated by the statute under consideration.

The fourth section only enjoins upon the Legislature the duty to make provision by law for the distribution of the interest of such portions of the common school fund among the several counties as has not theretofore been

intrusted to them. There is no direction how or in what proportions it shall be distributed. Appellee's contention here is that as the money was distributed to Wayne township as tuition revenue according to the number of school children in the township, if the unexpended balance is to be returned to the treasurer for redistribution by the superintendent of public instruction, the equality of distribution which they contend the constitution contemplates will be overthrown and destroyed.

The 5th section simply enjoins the duty on the Legislature in case any county shall fail to demand its proportion of such interest for common school purposes, to reinvest the same for the benefit of such county. There is nothing in that section defining what proportion of such interest such county may demand. Without some other provision it would be difficult, if not impossible, to reach the conclusion that any sort of a distribution provided for by the Legislature would be contrary to the mandate of the constitution.

It is not denied by the appellee's learned counsel, that these two sections were intended to apply to a state of facts that existed at the time of their adoption, but which have long since ceased to exist. We will not stop now to point out those facts. But, notwithstanding, appellee's learned counsel, basing their argument upon those sections, contend that: "The fund in controversy has once been granted under the provisions of the constitution, and the law enacted in conformity thereto, to the use of the schools of Wayne township; and can not be diverted, directly or indirectly, to any purpose other than that for which it has been granted." But the sections of the constitution relied on to support this contention do not aid it a particle, even if they were applicable to a State of facts existing at the present time; because if they are to be construed as vesting title in and

to the common school tuition revenue to be distributed in the one case, and reinvested in the other, they make no provision whatever in favor of the township, but direct a distribution of such interest to the county in the one case, and a reinvestment thereof for the benefit of such county in the other. If these sections operate as a grant of title to such tuition revenue, it is not in favor of the township, but in favor of the county. The controversy here is not between the State on the one side, and the county on the other, but it is between the State on the one side and the township on the other, so far as the claim of title to the money is concerned. That is, the township trustee, though sued to enforce the performance of an official duty on his part, seeks to defend on the ground that the title in and to the unexpended balance of tuition revenue in his hands had been vested in the school township by the constitution and laws, and hence, that the act in question was void as a violation of the constitutional provisions above referred to. The county is not a school corporation, and as such has no title to any of the school tuition revenue, though the county is, and may be used in its civil corporate capacity as an instrumentality in carrying into effect various provisions of the common school system. Therefore, if those sections of the 8th article of the constitution, *supra*, were even held applicable to the state of facts now existing, and to have the effect of vesting title in certain portions of the school revenue for tuition, it can afford no aid to appellee's contention, because he is not basing his defense on the right and title in the county to hold the money, but is basing it on the right and title of the school township, vested in it by these two sections of the constitution; and yet said sections make no grant to, and vest no title in, the township, of school revenue for tuition or anything else; if they vest title

by grant or otherwise in such revenues, they vest it in the county, and not the township. And this being a suit to compel the township trustee, in obedience to the statute in question, to return to the county treasurer the unexpended balance of such revenue, the appellee's contention militates against him, because it would establish that the statute in question only requires him to return such balance to the proper custodian, the treasurer of its owner, the county. Thus his contention would result in wiping out every shadow of a claim that the statute is unconstitutional on the ground that it operates to divest title or ownership in such revenues, and confers them on others. Therefore, in citing those sections of the constitution as the basis of his assault upon the validity of the statute in question, he has failed to comply with the rule that requires one making such an assault, on the ground that the statute violates the constitution, to show a clear violation, and to point out, or put his finger upon, the provision which, either expressly, or by fair implication, necessarily inhibits such legislation. *Robinson* v. *Schenck*, *supra*.

Appellee's counsel say that it violates the constitution, in that it operates to make an unequal distribution of school revenue for tuition among the several school corporations of the State according to the number of children in each within the school age. They contend that the constitution requires such equality as nearly as it can be practically attained; and that when such a distribution has once been made, the failure to expend all of such revenue during the school year for tuition can give no right to other school corporations to share in such balance without destroying the equality of distribution required by the 8th article of the constitution.

On the other hand, appellant's counsel contend that that article does not require absolute and actual equality

of distribution of the State school revenue for tuition. And in support of that contention they cite *Quick* v. *White Water Tp.*, 7 Ind. 570, and *Quick* v. *Springfield Tp.*, 7 Ind. 636; in both of these cases, it is held that it is competent and constitutional for the Legislature to authorize an unequal distribution of the State school revenue to the various school corporations in the inverse ratio of the amount of tuition revenue possessed by each school corporation derived from the income of the permanent congressional township fund, so as to make the distribution of school revenue from all sources when combined in each, equal according to the number of school children in each. It will be borne in mind that the congressional township fund, owned by the various congressional townships, is very unequal in amount, and consequently the school revenue derived therefrom is also very unequal in amounts among the several congressional townships. It must also be borne in mind that while the constitution makes the congressional township fund and lands belonging thereto a part of the permanent school fund of the State, yet it is settled law that neither that fund nor the school revenue derived from the income thereof can be diverted from the inhabitants of the congressional townships to whom the Congress of the United States granted the sixteenth section in said several townships for the support of common schools therein. *State* v. *Springfield Tp., etc.*, 6 Ind. 83.

It, therefore, became necessary to provide by statute for as great inequality in the distribution of the State school revenue for tuition to carry out what was supposed to be the purpose of the framers of the constitution to afford equal opportunities to all the school children of the State. Hence the decisions above referred to in 7 Ind., *supra*.

Counsel on both sides claim that those two decisions support their respective contentions, namely, on the one hand that the constitution requires an equal distribution of the tuition revenue as a whole, and, on the other, that the State tuition revenue may be unequally distributed without a violation of the constitution. Both contentions are consistent with those cases, but that does not quite meet the question in this case. Both sides concede that the State tuition revenue may be constitutionally divided unequally among the several school corporations of the State, and both virtually concede that such division must be so made as to overcome the existing inequalities in amount of school tuition revenue among the several school corporations caused by the inequality of the congressional township fund and income therefrom owned and held by said school corporations. But that does not reach quite far enough to settle the dispute here.

That dispute is, whether (after a distribution derived from all sources as nearly equal as it is practically attainable to make among the school corporations of the State, according to the number of school children therein under the rules laid down in the cases in 7 Ind., *supra*) it is competent or constitutional for the Legislature to require an unexpended balance of such revenue to be returned for redistribution, and will such return and redistribution destroy the equality of distribution required by the 8th article of the constitution? This query leads us to inquire what particular section of that article, if any, is it that requires such a distribution of school revenue for tuition as that when made there will be equality according to number of children? Appellee's counsel have pointed out no such provision that they even claim makes such a requirement. They have contented themselves by citing the whole article with all its

sections, and the two cases in 7 Ind., *supra*, in support of that claim. The only section that has the slightest bearing in that direction is section one of that article, which enjoins upon the Legislature the duty "to provide, by law, for a general system of common schools wherein tuition shall be without charge and equally open to all." This is the leading thought, the prime object of the whole article. That is the great end in view in the whole article to be accomplished, and whatever contributes to the accomplishment of that great end is but means to the accomplishment of that leading purpose. *Prima facie*, an equal distribution or division of the school revenue for tuition, according to the number of school children in each school corporation, would tend in that direction, but it may not always do so; it may not always furnish tuition equally open to all. Whenever and wherever it does not, it fails to accomplish the great end and purpose of the great and grand men who were the architects of our almost matchless common school system, and in that event an equal distribution of the school revenue for tuition would become a palpable violation of the first section of the article. If it were food and raiment that were to be provided for the school children, then an equal division of dollars and cents, according to the number of children, might be very plausibly urged as near an approach to equality in food and raiment as could be practically attained. But it is instruction and culture of the mind that form the great object to be attained, the better to fit and prepare the children of the State to discharge the duties and responsibilities of manhood and womanhood and citizenship of this great commonwealth. Nor does the State undertake to give to each child an equal amount of education. That would require a higher power than the State. But the constitution has enjoined upon the Legislature the important and delicate duty of so

framing our school laws as that tuition in our public schools shall be without charge and equally open to all. It is a well known fact in history that this grand system met with bitter opposition in the start, but, as time has proven the beneficent results flowing from it, that opposition has grown year by year weaker, until now there are very few indeed who do not claim to be friends of the system. To that opposition may be ascribed the mistake in the decision of this court in *Greencastle Tp., etc.*, v. *Black*, 5 Ind. 557, wherein it was held that a statute authorizing a local levy of taxes in a township to build and repair schoolhouses, and to raise tuition revenue to continue the schools in the township after the public funds shall have been expended, was repugnant to the constitution and void. And though that decision on that point was not overruled until nearly thirty years afterwards, in *Robinson* v. *Schenck*, *supra*, yet so great was the growth in popular favor of the system, that similar statutes were afterwards enacted authorizing such local taxation in aid of the system, and carried into execution without question for nearly twenty years before *Greencastle Tp., etc.*, v. *Black*, *supra*, was overruled. So that it may now be truly said that the architects of that system "builded wiser than they knew."

It is now the just pride of Indiana that she has a system of free schools from which have gone forth men from humble homes, as well as those from more fortunate surroundings, well equipped and prepared to fill stations of high importance, both of State and Nation; and the learned professions, both in and out of the State, have been furnished with many of their members as a direct product of that system, while knowledge and learning generally diffused throughout the community is the rule and not the exception.

Speaking of this system and the proper construc-

tion of the constitution in relation to it, this court said, in *Robinson* v. *Schenck*, *supra:* "There can be no doubt as to the purpose of our people regarding common schools; both in the constitution of 1816 and in that of 1851 are written provisions clearly expressing the purpose of the people to build up a great and beneficent system in which tuition shall 'be without charge and equally open to all.' The prime object sought is the creation of a system that shall be efficient and enduring. The best means adapted to this end are to be chosen, and all things that will tend to defeat this great purpose are to be put aside. We should wander far from our path of duty if we should give a meaning to the language of the people that would defeat what we know beyond all doubt was their leading purpose. Courts do not bind the constitution when they give it the effect which the people intended it should have. We know that to hold that there must be for the whole State one law, governing alike populous districts and sparsely inhabited localities, making the same provisions for the one as for the other, would defeat the great purpose of the constitution. * * * The constitution declares in very emphatic terms the duty of the Legislature respecting common schools, and the failure of that body to use all suitable means to build up and maintain the system would unquestionably be a grave breach of duty; but the constitution does not deny the right to the Legislature to select the means of building up and encouraging schools. * * * This provision imperatively enjoins the general duty upon the Legislature, but leaves to them much discretion as to the selection of means for the efficient performance of that duty."

The equal distribution of the State school revenue to the several school corporations of the State, according to the number of school children therein, is a means and

not an end, but the great purpose for which this means may be used is that "tuition shall be without charge and equally open to all" the children of the State.

As before observed, an equal distribution owing to local causes may operate to defeat this great end and leading purpose of the constitution. For instance, here is a township densely populated with twelve schoolhouses in it and enough children belonging to each to make a full school, and as many as can be taught in one school; over in another county is another township with the same extent of territory, but the children are only equal in number to two of the schools in the other township, but they are so scattered over the township that they must have four schoolhouses before they can all attend school. An equal distribution of the school revenue for tuition according to numbers will give to that township one-sixth of the amount that it will give the other township, and to each school in the sparsely populated township it would give just one-half the amount of tuition revenue that it would give to each school in the more densely populated township.

And supposing the teacher's salaries in each of the same quality would be the same, it would result in giving the children in the densely populated township twice as long schools, double the length of schools, and hence double the amount of tuition that it would give in the sparsely populated township. That would not be a compliance with the constitutional injunction that "tuition shall be without charge, and equally open to all." Many other causes of a local character might be mentioned as tending in some instances to make an equal distribution operate the same way; for instance the difference in the salaries paid teachers, parochial schools and other causes.

But should the densely populated township have an

unexpended balance of the amount distributed to it left over at the end of the school year, the statutory requirement that it be returned for redistribution is in strict conformity to the requirement of the constitution that "tuition, etc., shall be equally open to all." The constitutional requirement above mentioned, and a sound public policy have the good fortune in this case to coincide. It is believed that scarcely anything could be more unfavorable to the faithful administration of our common school system than to allow these unexpended balances to accumulate, and pile up in the hands of the township trustees, a constant temptation to dereliction of duty, if not of fraud and peculation. Moreover, so long as these balances are thus suffered to remain in the hands of the township trustees, the school children of the State are wholly deprived of the use of them. Besides, the crying evil which has fastened itself upon our grand school system, namely, the making of padded, fictitious and false enumeration of children, by which the number of children within the school age reported from some localities is said to be almost, if not quite, double the actual number, with a purpose of unduly increasing the amount of school revenue to be distributed to such localities will be greatly frustrated by this statute. If the township trustees are compelled to return unexpended balances, the temptation to make such untrue enumerations will be very much reduced. The writ states, and the demurrer admits, that after deducting $100 from the unexpended balance of the State school revenue for tuition, distributed to appellee as such trustee, there yet remains $322.05 thereof in his hands.

The complaint states a good cause of action, and the method of apportioning such revenues for the purpose of ascertaining the sum to be returned, as set forth in the complaint, is the only correct one which could be

adopted. Any balance on hand must be taken to be made up of what is left of the last preceding apportionment to a trustee. The demurrer, therefore, should have been overruled.

It is a mistake to suppose that a distribution of school revenue to the school corporations of the State changes the title or ownership of the money. The persons to whom the money is entrusted and to whom it is delivered, hold it as the agents of the State, and the State does not lose its control over it until it is paid out for tuition purposes.

We therefore hold that the statute is not unconstitutional. The judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

Filed March 6, 1894; petition for rehearing overruled June 22, 1894.

No. 16,224.

The New York, Chicago and St. Louis Railroad Company *v.* Perriguey.

138 414
140 339
138 414
145 638
138 414
151 600
138 414
164 192
138 414
166 371
138 414
170 14
170 232

Railroad.—*Negligence.—Personal Injury.—Proximate Cause.—Remote Cause.—Concurring Causes.—Fellow-Servant Rule.—Defective Headlight.—Collision.*—A, as engineer, was in charge of engine No. 172, which he was required to operate with a defective headlight. A had special orders to stop at S, and remain until No. 167 passed. A stopped at S, but in violation of such order pursued his journey with the defective engine, before No. 167 had passed. After leaving S two and three-quarter miles, and having observed the approach of No. 167, A stopped his engine when one and a quarter mile distant from No. 167, there being upon the front of No. 172 two green lights burning brightly, and on board were handlamps

to be lighted and placed in the headlight when it failed, for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion they were not so placed, and no headlight was burning. From S eastward the track was straight and free from obstruction, with a decline in the grade for four miles. No. 167 came from the east at the rate of thirty miles an hour, and her engineer and fireman having looked but failed to observe No. 172, collided with the same, in which collision B, the fireman on No. 172, was injured, for which injury he sues the railroad company for damages.

Held, that the proximate cause of B's injury was the negligence of A, a fellow-servant of B, in not obeying the order given him to remain on the side-track at S until No. 167 passed, and in failing to place the lighted handlamps in the headlight.

Held, also, that the negligence of the railroad company in failing to furnish a proper headlight was a remote cause of the injury.

Held, also, that the negligent omission of the company to furnish a proper headlight, and the negligent acts of A were not concurrent in causing the injury.

From the Wells Circuit Court.

A. Zollars, J. Morris, R. C. Bell, J. M. Barrett and *S. L. Morris*, for appellant.

L. M. Ninde, H. W. Ninde and *W. L. Penfield*, for appellee.

HACKNEY, J.—The appellee sued for damages for injuries sustained in a collision of two engines upon the appellant's railway. He secured a verdict for twelve thousand dollars, the jury returning with the general verdict answers to special interrogatories propounded by each party.

The complaint alleged that the appellee and one Wilson were, respectively, fireman and engineer for appellant, and in charge of engine No. 167, drawing a caboose west out of Ft. Wayne, with instructions to run at the rate of forty miles per hour to Argos, where they should meet and pass train No. 41, drawn by engine No. 172, in charge of Ferris, as engineer; that said Ferris was eastbound from Chicago, with orders to run to Argos

and lay up for No. 167; that the headlight of No. 172 was entirely useless by reason of certain defects, and that said Ferris was a reckless, dangerous, and unskilled engineer, both of which facts were well known to the appellant, the said defect for six weeks and the character of the engineer from the time of his employment, and which facts were unknown to the appellee. There are allegations as to the failure of the appellant to maintain a registry of the arrival and departure of trains at Argos, but appellee's counsel, in their brief, expressly deny any independent cause of negligence by reason of such failure, and we doubt the sufficiency of such allegations to have constituted a cause, proximate or remote, for the injury.

It is further alleged that Ferris ran No. 172 with his train to Argos, where he remained for some time, and, being informed by some one, and believing it true, that No. 167 had passed Argos, he pursued his journey; that it was night and said headlight furnished no light; that when he had gone from Argos about two miles, he saw No. 167 approaching, and stopped his train; that because of the absence of said headlight the appellee and the engineer on No. 167 could not see No. 172 in time to stop their engine and avoid a collision, and that, in the collision which followed, appellee's injuries were sustained.

The record contains numerous questions which have been presented by counsel for the parties with marked ability, but the primal point of contention arises upon the existence or nonexistence of the established negligence of the appellant as the proximate cause of the injury.

The established negligence of the appellant is in requiring its engineer, Ferris, to operate engine No. 172 with a defective headlight. This fact is found specially by the jury with other facts, some of which are as fol-

lows: Said Ferris had special orders to stop at Argos and remain until No. 167 passed; he did stop at Argos, but, in violation of his special order, pressed on in his journey with the defective engine. After leaving Argos two and three-quarter miles, and having observed the approach of No. 167, he stopped his engine when one and a quarter miles distant from No. 167. There were upon the front of No. 172 two green lights burning brightly, and on board were hand lamps to be placed in the headlight when it failed for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion were not so placed. From Argos eastward the track was straight and free from obstruction, with a decline in the grade for four miles. No. 167 came on at the rate of thirty miles an hour, her engineer and fireman having looked, but, failing to observe No. 172, the crash came.

There are findings as to how far the green lights could be seen, and there are questions as to whether the findings in that respect are supported by the evidence, but they go only to the question of contributory negligence, and are unnecessary to our decision.

It is also found that Ferris was not a competent and careful engineer, but it is further found that of this fact the company had no knowledge prior to the collision.

And it is found by the jury, as further stated in the answers to special interrogatories, that "such defective headlight" was "the proximate cause of said collision and the plaintiff's injury." Without stopping to analyze this finding, and to decide whether it is one within the province of the jury to make, we find that the conclusion stated is not supported by any evidence.

It is urged by the appellant, and conceded by the appellee, that Ferris and the appellee were fellow-servants;

and if therefore the injury was the result of the negligence of Ferris, the appellee should not recover. The appellant concedes its own negligence in the use of the defective headlight, but insists that this defect was not the proximate cause of the injury, while the appellee insists that this was the proximate cause, and if not the immediate cause, it was concurrent in cause with the negligence of Ferris, and that, therefore, the company may not excuse its participancy in the wrong by asserting that it had a joint wrongdoer. Was the act of the appellant the proximate cause of appellee's injury? In Wharton on Negligence, section 73, is this quotation from Lord Bacon: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking for any further degree." Judge COOLEY, in *Lewis* v. *Flint, etc., R. W. Co.*, 54 Mich. 55, says: "As between the causes which precede the proximate cause, the law can not select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless."

It is too well settled to multiply citations of authority to the point that it is the immediate, and not the remote, cause of injury that creates the liability, but as there is no rule by which every case can be tested, and known to determine distinctly its class, in the order of causation, we find the difficulty in distinguishing between the immediate and the mediate, or the remote cause of the injury. Cases may illustrate, but definitions are not sufficiently explicit for practical application. In this case the act of the appellant was in directing an engineer to sidetrack at a way station, an engine known by

it to be imperfectly lighted, and to there detain such engine until appellee's engine had passed. The use of the engine at the particular time, and under the particular circumstances, are inseparable from its condition, in determining the negligence of the appellant.

As we have said, it was found by the jury, and is conceded by the appellant, that it was negligence to place the defectively lighted engine upon the main track, in the darkness of the night, without the use of the handlamps, but it must be remembered that to have so placed it was in violation of the orders of the appellant. So placing the engine was the immediate cause of the collision. That was the negligence of Ferris. The absence of light accounts for the appellee's inability to avoid the collision. Not the absence of a particular light, *the headlight*, any more than the absence of the handlamp in the headlight, which handlamp was found sufficient to be seen five miles distant. The absence of the handlamp was due to the carelessness only of Ferris, and not to the appellant. It probably is true, as appellee argues, that if the headlight had not been defective, but had been in good order and burning brightly, the collision would not have happened. It is equally true, that if No. 172 had not been on the trip the collision would not have occurred.

Judge Ray, in his recent work on Negligence of Imposed Duties to Passengers, says: "Where the concurring cause is the independent, wrongful act of a responsible person, such act arrests causation, being regarded as the proximate cause of the injury, the original negligence being considered merely as its remote cause. As, in the law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury."

Again he states that "In civil cases, a defendant is

not responsible for results, except such as are, natural, proximate and direct, if such consequences are caused by the acts of others, so operating on his act as to produce the injurious consequences, then he is not liable."

These statements of the rule are fortified by many authorities, as may be seen by reference to that work, pp. 669, 670.

In *Milwaukee, etc., Co.* v. *Kellogg*, 94 U. S. 469, Mr. Justice Strong states the rule in this manner: "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * It is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

He states further: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

The rules quoted are so fully recognized in the cases in this State as to require no further comment. *Alexander* v. *Town of New Castle*, 115 Ind. 51; *Terre Haute, etc., R. R. Co.* v. *Buck, Admx.*, 96 Ind. 346; *Billman* v. *Indianapolis, etc., R. R. Co.*, 76 Ind. 166, and the cases collected in these decisions.

In determining whether, in this case, there was an intervening responsible cause for the injury, between the omitted duty of the appellant and the injury to the appellee, we reach the conclusion that appellant's wrong was or was not the proximate cause of the injury.

In *Scheffer* v. *Railroad Co.*, 105 U. S. 249, it was held that the death by suicide of one from a disordered mind occasioned by an injury sustained in a collision of railway trains was not the proximate result of the negligence causing the collision. His added act of self-destruction was a new and independent cause.

In *Carter* v. *Towne*, 98 Mass. 567, a druggist sold carelessly two pounds of gunpowder to a minor of eight years, which powder the child exploded and was thereby injured. It appeared that when purchased the powder was taken home by the child and kept in the house for a week, when the boy's mother gave it to him and permitted him to explode it. It was there held that though the druggist was negligent in selling the powder to a child of such tender years, yet the negligence of the mother interposed between the sale and the injury, and cut off the line of causation from the druggist's negligence.

One discharged from service before the end of his term because of the slanderous utterances of another against him, can not recover from the slanderer for the loss of employment, though the remote and indirect cause of his loss; the master's act is the proximate cause of it. *Vicars* v. *Wilcocks*, 8 East, 1.

In selling diseased sheep to a butcher, a farmer fraud-

ulently represented them as sound, and by reason of their unsound and diseased condition the butcher lost the trade of his customers, and sought damages for such loss from the farmer. It was held that the fraud was but the remote cause of the loss, and the independent intermediate acts of the customers the proximate cause. *Crain* v. *Petrie*, 6 Hill, 522.

Because of a defect in a highway, a traveller went into an adjoining field where he received injuries. In a suit for the injuries as the result of the defect in the highway, it was held that such defect was the remote and not the proximate cause. *Tisdale* v. *Inhab. of Norton*, 8 Met. 388.

In *Anthony* v. *Slaid*, 11 Met. 290, the plaintiff, obliged by contract to support in sickness and in health the paupers of a town, brought suit against one who had beaten one of such paupers, whereby additional service and increased expense was occasioned to the plaintiff. It was held that no recovery could be had.

Of the same class of cases are *Silver* v. *Frazier*, 3 Allen, 382; *Bosch* v. *Burlington, etc., R. R. Co.*, 44 Iowa, 402; *Dubuque, etc., Assn.* v. *City and County of Dubuque*, 30 Iowa, 176, and *Lewis* v. *Flint, etc., R. W. Co., supra*. In the last case are cited by Judge Cooley, *Daniels* v. *Ballantine*, 23 Ohio St. 532, and *McClary* v. *Sioux City, etc., R. R. Co.*, 3 Neb. 44, with this statement: "In each of these cases the negligence of the defendant left the property of the plaintiff where, by the act of God,—in one case a flood, and in the other a tornado,—it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of injury."

Our own case of *Alexander* v. *Town of New Castle*, *supra*, held that leaving negligently an unprotected excavation near a public walk, and into which a prisoner in

custody hurled the officer, furnished no cause of action against the town. The negligence of the town made the act possible, but the act of the prisoner was the immediate cause of the injury sustained.

So in the case before us the negligence of the appellant made it possible for Ferris to set the dangerous obstruction upon the railway, but it was his act in placing it there in violation of expressed instructions that caused the injury. It was not negligence for the appellant to have left its engine standing in its yards in a proper place for repairs, nor was it negligence to have left it upon a siding at Argos until No. 167 had arrived and passed. So standing, it was harmless. That it would have been moved out upon the main track in the face of an approaching train, in violation of the direct orders of the company, could not have been reasonably anticipated by the appellant. No reasonable prudence and foresight could have determined upon such a result without a knowledge of the recklessness and ignorance of the engineer, a fact here found to have been unknown.

Suppose this suit were against Ferris for the damages resulting to appellant's engines or by the appellee for his injuries, could he assert, with reason, that his negligence was not the proximate cause of the collision? Suppose the conduct of Ferris in promoting the collision to have been wanton or willful, could it be said that the prior negligence of the company was the proximate cause of the collision? We believe not.

The movement of the train under the management of Ferris was the independent wrongful act of a responsible person; such act of Ferris was not induced by the act of the appellant, nor did the act of Ferris so operate on the act of the appellant as to cause appellant's act to produce the injury. If it had so operated, according to

the authority we have cited, responsibility would not attach to the appellant's act.

The absence of the headlight was not the cause of the injury. Such absence was but an incident to the appellee's failure to avert the collision. We can not escape the conclusion that the wrongful act of Ferris was the immediate cause of the injury.

Regarding the appellee and the engineer Ferris as fellow-servants, as it is agreed we must, can we hold the appellant responsible for the wrongful act of Ferris? The appellee contends, as we have shown, that the assumption of the negligence of a fellow-servant does not include his negligence where it concurs with the negligence of the master in producing injury. We are advised of the rule so asserted and do not desire to infringe that rule, as we have held it in *Rogers* v. *Leyden*, 127 Ind. 50.

The only question we entertain is as to the application of the rule. Where the defect in the machinery, or the want of skill of a fellow-servant, or the unsafety of the place where occupied, are within the knowledge of the master, are not known to the servant, and are the immediate cause, or one of the concurring immediate causes, of the injury, there is not, and ought not to be, any doubt of the application of the rule that the master may not hide his liability behind the concurring act of his employe.

In addition to the cases cited in *Rogers* v. *Leyden*, *supra*, we cite the authorities of the appellee: 2 Thompson Neg., 981; *Cayzer* v. *Taylor*, 10 Gray, 274; Wharton Neg., sections 3–788; 1 Shear. & Redf. Neg., sections 25 to 28; *Hawkesworth* v. *Thompson*, 98 Mass. 77; *Phelps* v. *Wait*, 30 N. Y. 78; *Pfau* v. *Williamson*, 63 Ill. 16.

We have found that the act of the appellant was not a proximate cause of the injury; that the act of Ferris was

the immediate cause of the injury, and it follows that the two acts were not concurrent in causing the injury.

We doubt if a case can be found where an act of the master, though negligent but not causing injury or concurring as a cause of injury, is coupled with a wrongful act of a servant and made the basis of recovery for such injury.

The case of *Paulmier* v. *Erie R. R. Co.*, 34 N. J. 151, cited by appellant, and in *Rogers* v. *Leyden*, *supra*, as the principal authority, presented this distinction from the case before us: there was a latent defect in the roadbed, of which the company and the plaintiff's fellow-servant had knowledge, the company owed to the servant the duty of disclosing that knowledge and in this duty failed when the fellow-servant drove the engine upon the latent danger and caused plaintiff's injury. There defect, as in *Rogers* v. *Leyden*, *supra*, was the immediate cause of injury.

We have, in our own State, many cases holding a liability where the master knows of the lack of skill of a fellow-servant, and the plaintiff has no such knowledge, and from which lack of skill injury results. There, however, the lack of skill is the direct cause of injury. If the rule were otherwise, the duty to employ suitable servants and machinery would be defeated.

If the rule contended for by appellee should prevail, the master would become an insurer of the safety of his servant against the negligence of a fellow-servant, however gross, if the negligence of the master, however slight and however remote from the cause of injury, could be discovered to have offered an opportunity for the negligence of such fellow-servant.

We conclude that the answers to interrogatories are in irreconcilable conflict with the general verdict, and that the motion of the appellant for judgment *non obstante veredicto* should have been sustained.

The judgment of the lower court is reversed, with directions to sustain said motion.

Filed May 19, 1893.

On Petition for a Rehearing.

Hackney, J.—A petition for a rehearing has been presented by elaborate and able briefs, and we have given it our most careful consideration.

If we could believe, as counsel seem to believe, that the rule of this case would destroy the obligation of the master to supply the servant with safe appliances for the service in which he is engaged, we would unhesitatingly uphold that obligation. But when the master can say, as the jury have found in this case, that he has supplied a headlight which, if burning, could have been seen the distance of five miles, and when his only failure is in the character of the lamp, and not in the efficiency of the light for practical uses and in the protection afforded his servants, it can not well be said that there has been an abandonment of that obligation. The appellee could contend for no more than that the absence of an efficient light was the cause of the collision. The means of supplying it were provided by the master. The employment of the means was a duty resting upon Ferris, the appellee's fellow-servant, and not upon the master. If the lamp of the headlight had not been out of repair, Ferris should have lighted it, and his failure to do so could not have been charged to the appellant. If it had been the duty of Ferris to take on a new headlight at Argos, and he had failed to do so, when it was provided by the company, such negligence would not have been chargeable to the appellant. It is not even suggested that it was not the duty of Ferris to light the handlamps and place them in the headlight, nor is it intimated that his failure to do this is properly due to the appellant's negli-

gence, or, of itself, creates any liability against the appellant.

Taking out of consideration the violation, by Ferris, of explicit orders to remain at Argos until the appellee's train had passed that station, there would seem to be but little basis for the claim that the appellant's omission was the cause of the collision. It would then present the case upon the absence of a light as the cause of the collision, or as the cause for the failure to avoid the collision, the appellee insisting that it was the absence of a particular light, the regulation headlight, and the evidence having shown the presence of efficient lamps, not burning because of the negligence of appellee's fellow-servant. To cast the responsibility upon the company and not upon Ferris would be to charge the company for the mere difference in the form of the lamps effecting the same results, avoiding the collision, and thus predicate our decision upon a shadow while abandoning the substance. To do this would be to strike down a well-settled rule, the fellow-servant rule, and hold the master liable where the direct and immediate cause of the injury is the negligence of a fellow-servant. To so decide would run counter to that well established rule, observed in the original opinion, and fortified by the unbroken line of authority for centuries, that it is the proximate, and not the remote cause of injury against which relief is granted.

Again, the appellee urges that the servant does not assume the negligence of the master, nor of the fellow-servant participating with that of the master. Again, we assent to this proposition, but it does not imply that the master is liable for an injury occasioned directly by the negligence of the fellow-servant, although the master may have been guilty of negligence not participating in the injury. The law does not punish the

master for a negligence which occasions no injury. If it did, the injury would not be a condition of recovery. When we find that the appellee's misfortune was due to the negligence of Ferris, a fellow-servant, and that the appellant's omission was not a juridical cause of the injury, we have then reached the point that though such omission was negligent, and co-existed with the negligence of Ferris, it was not a concurrent cause of the injury. The omission may have concurred as a condition, but not as a cause, and herein there is a wide distinction. See Wharton's Law of Negligence, section 85, p. 323. This distinction is well stated in *Bostwick* v. *Minneapolis, etc., R. Co.*, 49 Am. and Eng. R. R. Cases, 527, as follows: "Negligence is contributory when, and only when, it directly and proximately induces the injury in whole or in part. * * * Where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of the injury." See, also, *McGahan* v. *Indianapolis Natural Gas Co.*, 37 N. E. Rep. 160.

Again, the appellee urges that if it had not been for the appellant's omission the collision would not have occurred. This is but an effort to reach the conclusion that appellant's omission was a proximate cause of the injury, but the argument is treated by Wharton (Neg. 323) as sophistical. In discussing the proposition that remote negligence is not contributory negligence, that learned author says: "A person, it has been seen, is juridically the cause of an injury, if his act (or omission), supposing that there is no intervention of disturbing independent moral agents, would be, according to the usual course of events, followed by such injury.

This, as is shown by a distinguished contemporary German jurist, is the true application of Aristotle's exposition of causation, which is accepted by the Roman jurists, and is equivalent to the distinction between proximate and remote causation, as expressed by Anglo-American law.

"It is not enough * * to apply this definition to negligence (to declare), that if the injury would not have occurred had it not been for the plaintiff's negligence, then the plaintiff's negligence is to be regarded as the cause of the injury. Of multitudes of antecedents can it be truly said, that if they had not existed the injury would not have occurred; yet of how few of such antecedents can it be said that they juridically caused the injury.

"A gas company, to take one of the cases which the present discussion presents, neglects to close a leaking pipe, and in consequence of the leakage the plaintiff is injured. Had the plaintiff not been in the town at the time,—had the plaintiff never been born,—had there been no gas in the particular pipe,—had there been no gas company in the particular town,—had gas never been invented,—then the injury would not have occurred. That the plaintiff was in the town at the time,—that the plaintiff existed,—that there was gas in the leaking pipe,—that there was gas in the town,—that there was gas any where,—all these are *conditions* of the plaintiff's injury, without which it would not have existed; but no one of these is a juridical cause of the injury. To constitute a juridical cause, therefore, it is not sufficient to say that it is enough that without the existence of the condition in question the injury would not have taken place."

In the present case, the defect in the lamp of the headlight was a condition; the cause of the collision was the absence of light. The absence of that light was not the

defect, but was the failure of Ferris to light the hand-lamps and place them in the headlight from which the presence of his engine could have been seen for the distance of five miles and the collision averted.

It is insisted that the decision in this case is in conflict with that in the *Pennsylvania Co.* v. *Congdon, by Next Friend*, 134 Ind. 226, 33 N. E. Rep. 795.

The complaint in that case charged a defective lantern, from which defect its light was easily extinguished by the wind, such defect being known to the company and unknown to the servant. On a moving freight train the wind blew out the light, leaving the brakeman in the darkness, and required, for the safety of the train, to give signals with his lantern lighted. To again light it, it was necessary to go forward to the engine, and, in doing so, he was thrown upon the tracks and injured. In considering the question, the court accepted the management of the train—suddenly applying the air brakes—as proper, and not negligent. It was held that proximate cause is not necessarily that nearest in time to the injury, and that the alleged negligence of the company in supplying a defective lantern was the moving and dominating cause of the injury.

With this holding we fully agree, and are unable to observe its conflict with the holding in this case. It is always the first duty of the court to ascertain the dominating or proximate cause, and there apply the liability, disregarding the mere incidents preceding or following that cause. If the original act or omission can be found to have been the moving dominant cause of injury, it will not be insulated by a mere incident gathered up and carried forward with it. Nothing less than an intervening responsible agent will cut off the line of causation, however remote in time.

This we understand to be the holding in the case re-

ferred to. There the absence of light was charged to the master's fault, and as such was the cause of the injury, uninterrupted by an independent cause or agency. Here the absence of light was owing to a fellow-servant's omission, which sustained no relation to the master's omission.

We feel that there is no doubt of the correctness of our position, and are unable to agree with the appellee in his petition. Nor can we believe that the ends of justice require us to order a new trial as asked. The knowledge of the appellant of the want of skill on the part of Ferris was in issue, and it was found expressly that no such knowledge existed. The record does not confirm the suggestion that this issue was inadvertently overlooked, and we find it necessary to ignore the appellant's assignment of error upon the overruling of its motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, if we should order a new trial.

The petition for a rehearing is overruled.

DAILEY, J., did not participate in this case.

Filed June 19, 1894.

CONCURRING OPINION.

HOWARD, J.—Three distinct acts of negligence are considered in this case,—one act by the appellant company, the sending out of an engine upon the road at night without a sufficient headlight; and two acts by the engineer Ferris, one in failing to keep his train upon the sidetrack at Argos until appellee's train had passed, and the other in failing to put up and light the hand lamps which appellant had provided as a substitute for the regulation headlight. From one or more of these acts of negligence appellee received his injury. The appellant company admits its own negligence, but contends that not its own negligence but the negligence of Ferris, co-

employe of appellee, was the proximate cause of the injury.

It is the law that one can not excuse his own negligence by showing that some one else was also negligent. If an injury is caused to an employe by the concurrent negligence of his employer and of a co-employe, the employer can not shift the burden of liability from his own shoulders to those of the co-employe. In such a case, it is only when the employer is himself free from fault that the liability rests wholly upon the co-employe. If the negligence of the employer sets a cause in motion which continues till, in the end, it becomes a constituent element in bringing about the injury, so that the injury would not have occurred without the negligence of the employer; then, although the negligence of co-employes or other third persons may have contributed to the final result, yet the original negligence, still active to the end, is, in law, a proximate cause of the injury.

It was said in *Pullman Palace Car Co.* v. *Laack*, 143 Ill. 242, that the master must, either personally or by his agent, exercise reasonable and proper care to provide and keep in suitable repair and condition, safe and suitable machinery and appliances, adequate and sufficient for use by the servant in and about the business in which it is to be used by him. And if a servant be injured in consequence of a neglect of such duty, or a negligent discharge of it, he being in the exercise of ordinary care, the master is liable.

It necessarily follows that, in the discharge of the duty resting upon and owing by the master to the servant, the acts of the person authorized by the master to perform the duty are the acts of the master. The liability of the master does not depend upon who performs the duty, but upon the existence of the duty itself, which the master must perform, and he can not, by delegating

it to another, absolve himself from liability for its non-performance. The law will not permit the master to evade the duty which it has cast upon him by shifting it upon another.

Further, as to proximate and concurrent causes, see Shear. & Redf. Neg., section 346 and notes.

If, therefore, in this case, the appellant company sent out a train at night without a headlight, and a collision occurred in consequence, it seems very clear that the company can not relieve itself of liability by showing that its servant disobeyed certain orders, as to remaining on a sidetrack at Argos, or otherwise. At most, this would show another act of negligence; it would not, in any degree, remove appellant's own negligence. The dark train upon the track was dark because so sent out by appellant; and that darkness was an essential element in bringing about the collision. This cause was the direct result of appellant's negligence, and the presence of another cause due to a servant's disobedience to orders can not lessen appellant's liability for its own negligence actively present in the collision.

The failure of the engineer Ferris to remain at Argos, therefore, in no way shifts the burden from appellant.

But the jury also found that while the company failed to send a regulation headlight with the engine, it did send as substitutes two handlamps, which, if lit, could have been seen upon the engine a distance of five miles. It would have been the duty of the engineer to have lit the headlight if it had been furnished by the company; it was equally his duty to light the substitute handlamps which were furnished by the company. The company's duty, in this regard, was done when it furnished the proper lamps; the engineer's duty was to light the lamps. It would seem, therefore, that the company performed its duty by furnishing lamps, which, though not the

best, were yet sufficient to give light for five miles, and so avoid the accident. The engineer, however, failed in his duty to light the lamps. The jury found that the engineer was incompetent, but they also found that the company was at the time unaware of such incompetency. It would seem, therefore, that the proximate cause of the injury to appellee was the negligence of his co-employe in failing to light the handlamps on the engine.

With some reluctance I am, consequently, constrained to concur in the opinion overruling the petition for a rehearing of this case.

Filed June 19, 1894.

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No. 16,577.

Reynolds, Auditor, et al. *v.* Bowen, Administrator.

Taxes.—*Omitted Property.—Power of County Auditor to Assess.—Information.*—In making assessment of omitted property, the county auditor may act upon any information, written or oral, or even upon his own belief.

Same.—*Omitted Property.—Notice.—Description.*—The notice of intention to assess, by the auditor, need describe the property only in general terms.

Same.—*Taxing Statutes Liberally Construed.*—The power to assess is a summary one, and to secure uniform and just taxation, and to protect the revenues of the State, and in the interests of honest taxpayers, it is necessary that assessment statutes should be liberally interpreted in aid of the taxing power.

Same.—*Suit to Cancel Taxes Levied on Omitted Property.—Insufficiency of Complaint.—Failure to Come into Equity with Clean Hands.*—Where an administrator brings suit to cancel certain taxes assessed against omitted property of his decedent, by the county auditor, the administrator must show, in his complaint, that he has done equity, before he is entitled to equitable relief; and where the administrator makes no pretense that the original assessment was

a fair or just one, or that the decedent had, in fact, given in all his property for taxation, the complaint is insufficient on demurrer for want of facts.

SAME.—*Omitted Property.—When Notice Should be Served on Administrator.*—The personal representative of a decedent is the proper person to receive notice of intention to assess omitted property from the assessment of his decedent.

SAME.—*When Irregularities do not Affect Assessment.*—Irregularities do not affect the correctness of a tax assessment, if the proceedings are substantially correct, and the assessment is fair and just.

SAME.—*Omitted Property.—Right of County Auditor to Assess.—Reënactment of Old Section (1881) in New Statute (1891).—Effect.*—That section of the tax law of 1881 authorizing the assessment of omitted property by the auditor, was reënacted, *verbatim*, in the tax law of 1891; and the reënactment of such section in the new law has the effect to keep such section of the old law in force without interruption, even though the old law was expressly repealed.

From the Carroll Circuit Court.

M. A. Ryan, J. H. Gould and *G. R. Eldridge*, for appellants.

R. C. Pollard, C. R. Pollard and *M. Winfield*, for appellee.

HOWARD, C. J.—On the 17th day of September, 1891, the appellee began this action against the appellants, by filing in the Carroll Circuit Court his complaint in three paragraphs, asking for the cancellation of certain taxes charged against his decedent's estate.

The questions presented by the record arise upon the overruling of appellants' demurrers to the complaint. The appellants refusing to plead further, judgment was rendered against them, and the auditor and treasurer were ordered to cancel and "strike from the tax-duplicate of Carroll county, Indiana, the several amounts so placed upon said duplicate by said auditor as omitted property."

From the transcript of the proceedings before the auditor, which is set out in the complaint, it appears that

the auditor, having received information that certain personal property of the decedent had not been listed for taxation for the years from 1881 to 1889, inclusive, issued to the administrator a written notice requiring him to appear and show cause why such omitted property should not be added to the tax-duplicate.

In response to this notice, the administrator appeared before the auditor, and moved to set aside the notice as insufficient, which motion was overruled by the auditor.

The administrator thereupon answered, first repeating his objection to the notice as not sufficiently specific in the description of the omitted property; stating also that the administrator had no means of knowing whether the sums charged as omitted were correct or not, and that, as administrator, it was his duty to deny, and he did deny each item so charged, and demanded that strict proof be made.

It was further stated in the answer, that for each of the years named "the deceased subscribed and swore to a tax list made out in due form of law and handed it to the proper assessor, wherein the deceased returned credits and money loaned" in the several amounts named; "That this valuation was approved by the assessor, who duly returned the same to the auditor of the county; that said valuations were duly submitted to the board of equalization, and duly approved by said board, and the auditor of the county duly placed the same upon the tax duplicate; that the deceased paid in full his State, county and school tax thereon."

The administrator further answered that section 259 of the general tax law, approved March 6, 1891 (p. 291), repealed all laws and parts of laws within the purview of that act, including section 1 of an act approved March 9, 1889 (p. 341), which was an act to amend section 147 of an act concerning taxation, approved March 29, 1881;

that there is, therefore, no law now in force for the taxation of omitted property, but section 142 (p. 257) of the tax law of 1891, which last section is prospective only, and does not authorize the assessment of property so omitted prior to 1891.

The statement filed by the auditor continues: "In this investigation, I was embarrassed by the refusal of those who had the custody of the books, notes, mortgages and papers of the deceased, to produce them in evidence; and, hence, I am compelled to decide from the best evidence before me. It clearly appears from the evidence, that the notes and mortgages which are of record in this and surrounding counties are of the value shown by the records."

"Many witnesses testified before me, relating to said alleged omitted property, and many records and documents were read in evidence.

"The hearing was continued from day to day until the 10th day of April, 1891, when all the evidence having been given by agreement of all parties, I took the case under advisement.

"I now find that during all the years, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888 and 1889, the said Abner H. Bowen was a resident of the city of Delphi, in Carroll county, Indiana; that he departed this life on the 10th day of February, 1890, and, at the time of the commencement of this proceeding, and until the 3d day of July, 1891, the said William R. Stewart was the administrator of Bowen's estate; it being suggested that Nathaniel W. Bowen succeeded Stewart as such administrator on the 3d day of July, 1891.

"I further find that for the said years the said Bowen's personal property was not all listed for taxation, but, on the contrary, that property belonging to him was omitted from the assessment books and from the proper tax

duplicates for the several years which is and was of the following value:

"For the year 1881, moneys, money loaned and credits	$104,600 00
"For the year 1882, moneys, money loaned and credits	134,000 00
"For the year 1883, moneys, money loaned and credits	146,000 00
"For the year 1884, moneys, money loaned and credits	162,500 00
"For the year 1885, moneys, money loaned and credits	172,000 00
"For the year 1886, moneys, money loaned and credits	175,000 00
"For the year 1887, moneys, money loaned and credits	218,840 00
"For the year 1888, moneys, money loaned and credits	219,000 00
"For the year 1889, moneys, money loaned and credits	252,000 00

"I find that the above omitted property was owned by said Bowen on the 1st day of April of the years above named; and I now assess the same as omitted property which has unjustly escaped taxation, and I now correct the proper tax duplicates of said county accordingly, and add said omitted property thereto."

It was averred in the complaint that the tax duplicates, as so altered by the addition of such omitted property, had been placed in the hands of the county treasurer for collection; that the taxes alleged to be due thereon amount to about thirty thousand dollars, and that the treasurer is insisting on their payment.

The question has therefore been raised as to whether this is a suit for the cancellation of the alleged illegal

taxes, or a suit to enjoin their collection. While the form of the pleadings shows an action for cancellation, yet the nature of the action and the result aimed at do not differ from those of a perpetual injunction; and we agree with counsel for appellee, that the question so raised is not important. Either form of action invokes the equitable jurisdiction of the court, and when all the necessary parties are before the court, such equitable relief may be granted as is consistent with the facts proved. *Keifer* v. *Summers*, 137 Ind. 106.

The objections to the auditor's assessment, urged in appellee's brief, are the same as those made in the complaint, and the same as those made originally in the answer to the auditor's notice to show cause why the omitted property should not be added to the duplicate. These objections we shall notice in order.

Appellee claims that "there was not, in the statement filed with the auditor, or the notice issued by the auditor to the appellee, or in the finding, any such identification and description of the alleged omitted property, as would authorize the auditor to assess it as omitted property." The law authorizing the proceedings by the auditor has been on the statute book since the enactment of the tax law of 1881, where it stands as section 147. It is section 6416, R. S. 1881, section 2129 of Elliott's Supplement, and section 142, *supra*, of the tax law of 1891; and, so far as necessary to set out, is as follows:

"Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part in the assessment of any year or number of years, from the assessment book, or from the tax duplicate, he shall proceed, to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such

property and the owner thereof with the proper amount of taxes thereon, to enable him to do which, he is invested with all the powers of assessor under this act.

"But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof, resides in the county and is not present, he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction."

As to the statement made to the auditor, and of which complaint is made, it would seem that it is sufficient, under the statute, if the auditor receive any information, written or oral, or even "if he shall have reason to believe" that any property has been omitted from taxation. The statement, whether written or not, is sufficient if it inform the auditor that property has been omitted which should have been assessed.

Appellee considers that the written notice to the property owner should set out the omitted property by specific description. But the statute requires only that the auditor "shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms."

"Taxes," as said in *Barker* v. *Morton*, 19 Ind. 146, "are not assessed against specific articles of personal property by description, but on the aggregate number,

quantity and value. Take money, take a stock of goods, or manufactured articles, the taxpayer is assessed for what he owned on the first day of January [now April]."

From the very nature of the case, it may well be that the auditor can give only a general description. The property-owner himself is the one who can give a particular description of his own property. This the tax law requires him to do in the first place, when he makes out his particular list and hands it to the assessor. It will be noticed, in the section which we are considering, that for the purpose of making the assessment of omitted property the auditor "is invested with all the powers of assessor under this act."

This gives to the auditor very large powers. Section 51 of the tax law of 1891 (p. 213) requires the assessor, in case any person shall neglect or refuse to make out a proper statement of his property, "or if the assessor shall be in doubt whether such statement is correct," "to examine on oath any other person whom he believes to have knowledge of the amount, or value of any property owned or held by such person so neglecting or refusing; and such assessor is authorized to set down and assess to such person such amount of personal property as he may deem just." The act of 1881 had similar provisions. Section 6340, R. S. 1881. The power to assess is a summary power; and, to secure uniform and just taxation, and protect the revenues of the State, both as to unscrupulous and dishonest evasion of the law, and also in the interests of honest taxpayers, it is necessary that assessment statutes should be liberally interpreted in aid of the taxing power.

Where title is sought through a tax sale, the statute is strictly construed in favor of the owner, but not where

the owner is attempting to avoid the payment of his just taxes. *Ricketts* v. *Spraker*, 77 Ind. 371.

It was never intended that proceedings before the auditor, such as those objected to in this case, should be conducted with all the precision and formality of an action in court.

There is another fatal defect in the objections made by the administrator to the notice and other proceedings of the auditor in assessing the omitted property. Appellee comes into a court of equity and asks that equity be done him. He should, therefore, first show that he has himself done equity. His objections, made before the auditor and repeated on this appeal, are: 1, that the notice was not sufficiently specific; 2, that for each of the years named the decedent had subscribed and sworn to a tax list, made out in due form of law, and handed it to the assessor, wherein the decedent returned certain credits and money loaned; that the valuation made by the decedent was approved by the assessor, duly returned to the auditor, submitted to the county board, again approved and so placed upon the duplicate; 3, that the administrator is not the proper party to notify in case of omitted property; and 4, that the act of 1891 repealed the law authorizing such action by the auditor. In short, the defense is that the decedent made his own assessment, swore to it, the assessing officers accepted the assessment so made, and now there is no help for it. The appellee makes no pretense that the assessment was fair or just, or that the decedent had, in fact, given in all his property for taxation. He says, in effect, to the State, "The thing is done, and what are you going to do about it?"

In taking this position, appellee seems to rely upon *Florer, Treas.*, v. *Sherwood, Admr.*, 128 Ind. 495, and *Woll, Treas.*, v. *Thomas, Admr.*, 1 Ind. App. 232. We

do not understand that these cases go any further than to hold that under the tax law of 1881 the county auditor, acting under his general authority to assess omitted property, has no right to increase the valuation of property returned by the assessor.

It may be admitted that if a dishonest property-owner make return to the assessor of a given note, or other obligation, at less than its true value, and by the mistake or connivance of the assessor such assessment is approved, and by like culpability of the county board it is finally placed upon the tax duplicate, and there is no appeal to the State Board, the State will have no redress except to prosecute the guilty parties criminally, and that the taxpayer in such case will escape the payment of his just taxes. But this has no bearing on a case where a property-owner fails to give in certain of his notes or other obligations, and is assessed only on the remainder. If he holds two notes, one for five hundred dollars and one for four hundred, each worth its face, and gives in for taxation, "notes, five hundred dollars," there is a plain omission of four hundred dollars which the auditor should assess if he learns of the omission.

As for current money, that, being itself the measure of value, is always worth its face, so that what is not given in is omitted. If one has nine hundred dollars in money, on hand or on call, and he gives in for taxation seven hundred, there is a clear omission of two hundred. This consideration of itself would be sufficient to show that the complaint in this case is bad, for it is not claimed by appellee that his decedent listed any money, but only "credits and money loaned" for the several years named; whereas, the law requires that "moneys" should be listed, and the auditor finds that not only "money loaned and credits," but also "moneys" were omitted from taxation during all these years. Both the tax law of 1881

and the present law make the distinction between money or "money on hand or subject to my order," and "money loaned." But, in any view, the holding in *Florer, Treas.*, v. *Sherwood, Admr., supra*, and *Woll, Treas.*, v. *Thomas, Admr., supra*, can hardly avail to justify a property-owner who comes into a court of equity, admitting, substantially, that he has not made an honest return of his property for taxation, and not denying that the assessment, as corrected by the auditor, is a just one. Might not the State, in such a case, meet the taxpayer on his own ground and reply: "The assessment is now corrected and placed upon the duplicate. Have you any reason to show why it is not a just assessment?"

Musselman v. *City of Logansport*, 29 Ind. 533, was an action to enjoin the collection of taxes on personal property on the ground that the sworn statement of the plaintiff was received by the assessor without question. The complaint was held bad. The court said that there was no averment that the personal estate of the plaintiff liable for taxation was less in value than the corrected assessment, none that his own sworn list was correct, nothing from which the conclusion could be drawn that the increased assessment was not entirely proper and correct; that it was only claimed that the plaintiff was not notified of the increase, and that there was no proof before the council; in a word, that the plaintiff sought the extraordinary process of injunction from a court of equity to protect him from paying a tax which, according to his own showing, it does not appear but that he ought, in justice and conscience, to pay. There was no equity whatever as the basis of his application. *City of Delphi* v. *Bowen*, 61 Ind. 29; *Ricketts* v. *Spraker, supra*.

In *Jones, Aud.*, v. *Summer*, 27 Ind. 510, it was sought to evade the payment of taxes because the assessments had been corrected by the auditor "without right and

contrary to law;'' but because it was not shown that the assessments, as corrected, were not in fact made upon the true valuation of the property, the injunction asked was refused. This court said further, speaking by Judge FRAZER, that it would be difficult to imagine a case more utterly barren of equity. The property owner ''committed serious errors in his lists, which in conscience, and as a good citizen, he ought voluntarily to have corrected, but did not. They were corrected, and now he asks to be secured in an advantage as the fruit of his own blunder, merely because the correction, though just, was directed by the wrong authority and without notice to him.'' The able and upright judge who decided that case continues: ''The decisions of this court heretofore, in restraining the collection of taxes, have gone to the utmost extent of authority. If we should now take the step required in this case to sustain the ruling below, we would be without the support of either reason or precedent, and the collection of public taxes would, upon the warrant thus given, be constantly arrested at the instance of those who seek to escape their just share of the public burdens.'' *Schmidt* v. *Wright*, 88 Ind. 56; *Cauldwell* v. *Curry, Treas.*, 93 Ind. 363.

In the case of *Sturges* v. *Carter*, 114 U. S. 511, appealed from the State of Ohio, the contention was ''That a taxpayer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer, in which his returns were assumed to be true, and that the Legislature can pass no act by which the falsity of the returns can for a limited period be exposed, and the payment of the taxes enforced—in other words, that the taxpayer has a vested right in the fruits of his false returns.'' Such a propo-

sition can not be sustained. *Foster* v. *President, etc., Essex Bank*, 16 Mass. 245.

"In our opinion," continues the court, "no right of the taxpayer was invaded by the act of 1878. His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the State, and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. It gave a new remedy to the State for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation."

But the auditor, in this case, denies that his action was a mere re-valuation of the property already assessed. He says expressly, "That for the said years the said Bowen's personal property was not all listed for taxation, but, on the contrary, that property belonging to him was omitted from the assessment books, and from the proper tax duplicates, for the several years. * * * And I now assess the same as omitted property which has unjustly escaped taxation, and I now correct the proper tax duplicates of said county accordingly, and add said omitted property thereto."

We think, therefore, that the objections made by the administrator to the sufficiency of the information received by the auditor, concerning omitted property, and as to the sufficiency of the notice issued by the auditor to the appellee to show cause why this omitted property should not be placed upon the tax duplicate, were not well taken.

It is next urged that the law does not authorize notice to the administrator as to omissions of property from assessment made by a decedent.

The property alleged to have been omitted in this case is personal property. On the death of the owner, the

law puts this class of property in the hands of an executor or administrator, who is made the personal representative of the decedent. The administrator gives bond for all the personal property of the decedent; it is all regarded as in his possession and under his control.

The statute provides for notice to "the person claiming to own such property, or occupying it, or in possession thereof," "if he resides in the county and is not present." Notice to any one but the administrator would have been insufficient. But the administrator was present, he appeared and answered; no other notice was necessary.

It is claimed that the proceedings were ineffectual because the auditor did not "file in his office a statement of the facts or evidence on which he made such correction." We think such a statement is shown in the complaint, in which the whole proceedings before the auditor, as filed in his office, are set out. Irregularities do not affect the correctness of a tax assessment, provided the proceedings are substantially correct and the assessment is fair and just. *Musselman* v. *City of Logansport*, *supra*.

It is finally contended that "The tax law of 1891 repealed all former laws upon the subject of taxation, and took away all rights existing under former laws except such as are expressly saved." And that "As the right of the auditor to assess omitted property for any year or years prior to its passage is not saved by the act of 1891, such right does not exist."

This, again, is claiming equity without doing equity. If these taxes were unpaid, they belong to the State. They are the State's property, and the right of the State to them never ceased. Appellee's claim, then, in this contention, amounts to saying: "These taxes may belong to the State, but she has deprived herself of the means

of collecting them." But, as a matter of fact, the statute of 1891 has not repealed the law authorizing the assessment of omitted property by the auditor. The Legislature, in enacting the tax law of 1891, had no intention of giving delinquent taxpayers any such advantage over the honest people of the State. If there is any class of property more than another, which that law sought to have returned and appraised at its true value, it is such property as is concerned in this suit, and which had for so long a time escaped taxation in the hands of unscrupulous money lenders, to wit: money, notes, bonds and other credits, and choses in action.

The full title of the tax law of 1891 is: "An act concerning taxation, repealing all laws in conflict therewith and declaring an emergency." The law authorizing the assessment of omitted property by the auditor is not in conflict with the tax law of 1891, for it is itself a part of that tax law, being, as we have seen, a re-enactment, word for word, of the former statute on the same subject. It stands as section 142 of the present law, and section 147 of the tax law of 1881. It has been in force, without interruption, since March 29th, 1881. Appellee says, however, that in the body of the present act there is a repeal of all laws in the purview of the act; that is, of all other laws on the subject of taxation. But by article 4, section 19, of the constitution, "If any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

No laws in the purview of the tax law, therefore, except those that are in conflict with that law, have been repealed. If the repealing section of the tax law should be found to have the meaning given to it by appellee, then so much of that section as embraced any subject not expressed in the title of the act would be void. It is

only laws in the purview of the tax law, which are in conflict with it that are repealed.

In the case of *Barber Asphalt Paving Co.* v. *Edgerton*, 125 Ind. 455, this court, citing numerous authorities, said: "Underlying all the rules for the construction of statutes is the cardinal and general one, that in construing a statute the court will seek to discover and carry out the intention of the Legislature in its enactment. In the search for that intention the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to other statutes upon the same subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history, and to the evils and mischiefs to be remedied."

Guided by that broad rule, we could have little difficulty in concluding that the Legislature, in enacting a law which might, in some measure, relieve the people of the State from the evils of unequal taxation, would never think of repealing a law which provided for assessing property which had been for years dishonestly kept off the tax duplicate, particularly when we find the same law, word for word, re-enacted in the new statute. But even if there were an express repeal of the law in question, and at the same time, in the same statute which repealed it, a re-enactment of the law repealed, the re-enactment would so far neutralize the repeal as to keep the old law in force without interruption. Sutherland Stat. Con., sections 133, 134, 156. The decisions of the courts are in harmony with the rule as stated by that author. *Middleton* v. *New Jersey, etc., R. R. Co.*, 26 N. J. Eq. 269; *Skyrme* v. *Occidental, etc., Co.*, 8 Nev. 219; *Capron* v. *Strout*, 11 Nev. 304.

Even where the repealing statute only substantially

reënacts the law repealed, it is held that inchoate statutory rights accrued under the old law are not defeated. *Moore* v. *Kenockee Tp.*, 75 Mich. 332.

In *Scheftels* v. *Tabert*, 46 Wis. 439, the rule is very emphatically stated: "When the revised and consolidated act reënacts in the same words the * act or acts so revised and consolidated, such revision and consolidation shall be taken to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act." Citing numerous cases in the same court.

In *State* v. *Wish*, 15 Neb. 448, there is a like expression of the rule: "Where the reënactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, that the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal."

The rule, as so stated, is quoted as authority by Judge ELLIOTT in the case of *Sage* v. *State*, 127 Ind. 15. See, also, *Wright* v. *Oakley*, 5 Met. (46 Mass.) 400; *Steamship Co.* v. *Joliffe*, 69 U. S. 450; *Mitchell* v. *Halsey*, 15 Wend. 241; *Douglas* v. *Douglas*, 5 Hun, 140; *Stafford* v. *His Creditors*, 11 La. Ann. 470; *Kesler* v. *Smith*, 66 N. C. 154; *United Hebrew Asso.* v. *Benshimol*, 130 Mass. 325; *Powers* v. *Shepard*, 48 N. Y. 540; *Cheezem* v. *State*, 2 Ind. 149; *Alexander* v. *State*, 9 Ind. 337; *Martindale* v. *Martindale*, 10 Ind. 566; *Cordell* v. *State*, 22 Ind. 1; *State* v. *Miller*, 58 Ind. 399; *Gorley* v. *Sewell*, 77 Ind. 316; *Sage* v. *State*, *supra;* and *City of Junction City* v. *Webb*, 44 Kan. 71, where many of the foregoing authorities, including Indiana cases, are cited.

There remains, therefore, no ground on which the complaint in this case can stand.

In *Musselman* v. *City of Logansport*, *supra*, it was said that the subject of taxation is one within the jurisdiction

of the law-making power, and that it is not the province of the courts to interpose obstacles to the execution of the legislative will, when clearly expressed.

It may be added that when we find honest officials, respecters of their oaths, as the auditor and ex-auditor, appellants in this case, it is the duty of the courts to uphold their efforts with the strong support of the law, as enacted by the Legislature of the State.

The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Filed March 6, 1894.

ON PETITION FOR A REHEARING.

HOWARD, J.—The appellee contends that the decision in this case is in conflict with the decision of the court in the case of *Florer, Treas.*, v. *Sheridan, Admx.*, 137 Ind. 28.

That decision intended to go no further than the decision of *Florer, Treas.*, v. *Sherwood, Admr.*, 128 Ind. 495, on which it was in part based. Of that and other like cases it was said, in the principal opinion: "We do not understand that these cases go any further than to hold that under the tax law of 1881 the county auditor, acting under his general authority to assess omitted property, has no right to increase the valuation of property returned by the assessor."

In *Florer, Treas.*, v. *Sherwood, Admr.*, *supra*, the description of the omitted property was held insufficient upon which to base an assessment, because it was expressly admitted "that a part of the property belonging to the party has been listed and assessed, and that the property which was listed and assessed, as well as that which it is claimed was not listed and assessed, all belonged to precisely the

same classes and is all described in the answer by the same words." In other words, the auditor was attempting a revaluation of property already assessed, instead of an assessment of omitted property.

In this case there is no such confusion of description; but the auditor says that the property which he proposes to assess as omitted property "has wholly escaped taxation."

The description includes "moneys on hand or on deposit," and the case of *Florer* v. *Sherwood, Admr., supra*, distinctly says that, "so far as money alone is concerned, a dollar should, of course, be valued as a dollar, and is sufficiently described and valued when the amount is stated." This statement is directly in support of the principal opinion in this case.

The auditor's attention, in this case, was directed to the case of *Woll, Treas.*, v. *Thomas, Admr.*, 1 Ind. App. 232, according to which he was told he "ought to regard this omitted property as simply an undervaluation of the property, which was duly listed for taxation." Very correctly he answered, "While I am no lawyer, I do not so understand that case." The court in that case said: "Our conclusion is, that the auditor had no right, under the law in force at that time, to assess any property as omitted, except distinct, definite, and recognizable articles which had not been listed and properly appraised for taxation by the assessor."

The auditor in this case, after a long and painstaking investigation, found "distinct, definite, and recognizable articles" of omitted property, "which had not been listed and properly appraised for taxation by the assessor," being "moneys, money loaned and credits," amounting in all to over a million and a half of dollars; and that "it clearly appears from the evidence that the notes and

mortgages which are of record in this and the surrounding counties are of the value shown by the records."

It is somewhat difficult to apprehend the position of appellee on this point. Counsel say: "We have never contended that there should be a specific description of the omitted property in the notice; but, on the contrary, have contended, and still contend, that there must be a general description sufficient to advise the owner of the claim of the auditor."

This is what the auditor has done in this case. This is what the statute, section 142, p. 257, of the tax law, requires: "Whenever the county auditor shall * * * have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part * * * he shall proceed to correct the tax duplicate, and add such property thereto, * * * to enable him to do which, he is invested with all the powers of assessor under this act. * * * Before making such correction or addition, * * *he shall give such person notice, in writing, of his intention to add such property to the tax duplicate, describing it in general terms."

Yet, while admitting that the statute requires only a general description of the property, counsel substantially, in page after page of their able brief, contend that the description is faulty because not sufficiently definite.

Counsel say that the auditor, "exercising, as he does, a bare, naked, extraordinary, statutory authority, must proceed in strict conformity to the law, or his attempted assessments are absolutely void."

The law itself does not prescribe this rigid rule; but, on the contrary, recognizes the summary character of assessment and taxation, and is satisfied with a substantial compliance, in good faith, with the requirements of the statute.

Section 224 (Acts 1891, p. 282), of the tax law, pro-

vides that "no general or specific tax authorized by the laws of this State, and which shall be assessed on any property in any township, city or town within this State by any officer authorized to make assessments or which if made by another person or may be adopted by such officer as his act shall be held to be illegal or invalid for want of any matter of form in any proceeding not affecting the merits of the case, and which shall not prejudice the rights of the party assessed."

There is no claim in this case that the property omitted was ever assessed, none that right and justice do not require that it should be assessed the same as any other property in the State. The argument is not as to the merits of the case, but only that certain technicalities were not fully observed in placing the property upon the duplicate. The property being upon the duplicate, the presumption is that it is correctly there. No taxes are void for mere irregularities in assessment, if there should be any, provided there is a substantial compliance with the statute.

Other questions discussed by counsel were, as we think, sufficiently considered in the principal opinion.

We have found, in the able and earnest argument of counsel, no reason to change the conclusion there reached.

To repeat the words of FRAZER, J., in *Jones, Aud.*, v. *Summer*, 27 Ind. 510, "The decisions of this court heretofore, in restraining the collection of taxes, have gone to the utmost extent of authority. If we should now take the step required in this case to sustain the ruling below, * * * the collection of public taxes would, upon the warrant thus given, be constantly arrested at the instance of those who seek to escape their just share of the public burdens."

The petition is overruled.

Filed June 22, 1894.

No. 16,679.

THE STATE, EX REL. KEITH ET AL., *v.* THE COMMON COUNCIL OF THE CITY OF MICHIGAN CITY ET AL.

138 455
154 297

138 455
171 262

MUNICIPAL CORPORATION.—*City.—Street Improvement.—Street Railway.—When Cost of Paving Between the Rails is Chargeable to the Railway Company.*—Where, by contract between a street railway company and a city, it is left to the judgment of the council whether they would assess the cost of pavement between the rails, against the railway company or against the abutting property, the assessment for the cost between the rails of the street railway can not attach to the abutting property when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay.

SAME.—*Street Improvement.—How Made.—Cost of.*—The street improvement could only be made on the order of the common council, and the assessment for its cost could be directed only against the specific property designated in the ordinance.

SAME.—*Street Improvement.—Authority of Mayor to Contract for.—When Ordinance a Part of Contract.*—If a mayor enter into a contract with a bidder for street improvement, by authority of the common council, his contract with the contractor for the improvement is binding only in so for as it is within the power conferred by the common council, and the ordinance directing the improvement, when properly referred to, constitutes a part of, and is the base of, the contract. That the ordinance is a part of the contract, see opinion.

SAME.—*Street Improvement.—Duty of Contractor to Take Notice of Ordinance.—Contract.*—It is the duty of a contractor to inform himself as to an ordinance on which his contract is based and which is to form the basis of his claim.

From the La Porte Circuit Court.

J. H. Orr and *W. B. Biddle*, for appellants.

J. F. Gallaher, for appellees.

DAILEY, J.—The city of Michigan City, Indiana, is organized under the general law of the State of Indiana governing municipal corporations, chapter 21 of the Revised Statutes of 1881, and the authority of the city gov-

ernment to alter and improve the streets within the city limits, and to burden the abutting property with the cost of such alterations or improvements is derived from article 4 of that chapter, in which the method of improvement and assessment is set forth in detail. At the time of the proceedings involved in this action, the law as set forth in the Revised Statutes of 1881 was in force.

Acting under the powers which were thus conferred upon them by the Legislature, the common council of said city, in the month of March, 1887, adopted an ordinance providing for the grading and paving of a part of Franklin street therein. The ordinance embodies the plans and specifications which were adopted at the same time, and is set out in the record. It is provided in this ordinance, that publication shall be made according to law, inviting bids for the performance of the work ordered; and in response to this publication the bid of the appellants, George Keith and David F. Woodcock, was tendered and accepted, and William F. Woodson, mayor of the city, was instructed to enter into a contract with the successful bidder.

The contract, as executed by George Keith for the appellants and by William F. Woodson for the city (appellee), appears in the record. This ordinance and the contract fully cover the transactions carried on between the city and the contractors; but the matters in controversy in this action introduce another corporation, namely, the Citizens' Street Railway Company.

In March, 1886, the common council of said city granted to this company permission to lay its tracks upon and along the streets thereof; and the portion of Franklin street ordered to be improved by the ordinance set forth in the record was a part of the route located by the street railway company, and their tracks occupied a strip four feet and eight inches in width in the center of the

street, from the south line of the Louisville, New Albany and Chicago Railroad south to Eighth street. One of the conditions contained in the franchise of the street railway company reads as follows: "Said street railway company shall plank or otherwise and substantially pave the space between its rails to a height equal to the surface of the rails laid by it."

It is not our purpose to discuss the force and effect of this condition at this place, and it is quoted here solely for the purpose of explaining this language in the ordinance:

"The cost of said improvement shall be borne by the property-owners owning lots or parts of lots fronting on the line of said street improvement, *pro rata*, according to the number of feet front owned by each owner, except the space between the rails of the Michigan City Street Railway Company's track, the cost of which shall be borne by said railway company," and the provisions in sections 4 and 5 of the ordinance, directing that the pavement between the rails of the street railway company should be separated from the balance of the pavement in the estimates of the city engineer, should be separately assessed by the council, and that its cost should become a separate lien.

Under this ordinance and contract the appellants performed the work of improving the street, and, in due time, the city engineer made the estimates which appear in the transcript, as a part of the return to the alternative writ.

The assessments, as made by the engineer, were approved by the common council and collected by the appellants, with the exception of the amount assessed against the street railway company, payment of which was refused by the company. Thereupon the appellants brought an action in the La Porte Circuit Court against

the Citizens' Street Railway Company, for the recovery of the amount assessed against it, but failed to recover judgment, and withdrew their suit. They then filed their petition in this action, asking that a mandate issue commanding the city authorities of Michigan City to assess the cost of the pavement between the rails against the abutting property, in addition to the amount this property had already paid on the cost of the improvement. The return of the city (appellee) to the alternative writ sets up the facts substantially as they have been sketched above.

Appellants demurred to this return on the ground that it did not state facts sufficient to constitute a defense to the writ, and upon the overruling of this demurrer they declined to plead further, and appealed to this court. The question for decision, then, is: Under the facts shown by the return, should the cost of the work between the rails be assessed against the abutting property?

The first position taken by the appellants' counsel is that the contract entered into by the city and the appellants provides that the cost of the whole improvement, including the part between the rails of the street railway company, shall be assessed against the abutting property. To justify this position it is argued that the contract is complete in itself, and should be considered independent of the ordinance. If all reference to the ordinance were removed from the contract, the construction contended for might be accepted as correct. But the contract does refer to the ordinance repeatedly and specifically, as follows: "That they will do all the paving and curbing on Franklin street, in said city, as mentioned in the ordinance and specifications for the paving and curbing of Franklin street," etc. Also, "that said party of the second part [appellants] will furnish all material,

and do all the work in curbing and paving Franklin street between the points designated, according to said ordinance and specifications, which ordinance and specifications are now on file in the city clerk's office, and to which reference is hereby made."

It would seem that this language is plain and broad enough to prevent a severance of the contract and ordinance, but it is contended that these references relate only to the question of specifications, such as the amount and quality of labor and material. These details, it is admitted, are incorporated in the contract by reference to the ordinance, and this must be so, otherwise the written contract would be incomplete and meaningless.

As to the method of payment for the work, it is argued that the ordinance is not alluded to, and the court is not authorized to go outside of the language of the contract in this respect.

Let us consider another clause of the contract. "Said party of the first part agrees to prepare the street for the purpose of curbing and paving in the manner required by said ordinance and specifications, and to pay said parties of the second part for all that part of said paving and curbing which said party is to pave and curb, according to said ordinance and specifications and plans, which are a part of this ordinance." This portion of the contract, it seems, clearly refers to the method of payment. The effect and intent of the language is evidently mistaken in appellants' brief, in which it is insisted that these references to the ordinance are only for the purpose of identifying the work. This portion of the contract is the agreement on the part of the city to pay. The work to be done is covered by the preceding part of the contract. The words "according to the ordinance and specifications" occur twice. It is unreasonable to assume that in each instance the phrase qualifies "pav-

ing and curbing," and in neither refers to the method of payment, which is the subject of the paragraph. The proper reading of this portion of the contract is, "the said party of the first part agrees to pay * * * according to said ordinance and specifications." In answer to the inquiry, "why should the word specifications be used in connection with the matter of payment?" it might be asked with equal propriety, why should the ordinance be referred to in order to identify the work? If the specifications say little as to payment, the ordinance states nothing as to labor and material, save as it incorporates the specifications; hence we are led to the conclusion that the ordinance is referred to to designate the method of payment. The ordinance is mentioned once more in the contract, as follows: "All the work done under this contract and said ordinance shall be completed by the first day of September, 1887," thus indicating that the parties to the agreement intended at the time to act under the ordinance.

It is clear that the references to the ordinance in the contract are with the intent and purpose of making the terms of the ordinance a part of the agreement, both as to the method of payment as well as to the amount and quality of labor and material. It is sound doctrine that "where two writings are connected by a reference of one to the other, they may be considered and construed as constituting but a single contract, in the same manner as if embodied in the same instrument." *Sewall* v. *Henry*, 9 Ala. 24.

In *Bradstreet* v. *Rich*, 72 Me. 233; *Bradstreet* v. *Rich*, 74 Me. 306, it is held that when a contract has reference to another paper for its terms, the effect is the same as though the words referred to were inserted in the contract.

In Parsons Contracts (8th ed.), vol. 2, pp. 669, 670,

it is said: "If there are contemporaneous writings, * so far in relation to the same subject-matter that they may be deemed part and parcel of the same contract, although not referred to in it, they may be read in connection with it." These principles justify the contention that the ordinance must be considered a part of the contract. This conclusion receives further and more convincing support from the part of the record which relates to the subsequent actions of the parties under the contract, and indicates their conception of it at the time of its execution.

In *Chicago* v. *Sheldon*, 9 Wall. 50, it is said: "In cases where the language used by the parties * is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence."

"Acts of the parties leading to, or done at the time of the execution of the agreement, or done in reference thereto, and those facts in view of the existence of which the agreement was entered into, may be considered," in construing a clause thereof, the meaning of which is obscure. *Stapenhorst* v. *Wolff*, 35 N. Y. Sup. Ct. 25.

Any doubt as to the construction of a contract may be removed by the construction put upon it by the acts of the parties themselves. *Parrott* v. *Wikoff*, 1 La. Ann. 232.

By an examination of the estimates of the work done by appellants on Franklin street, which the city engineer was instructed by the common council to prepare, and which are set out in the record, it appears that the pavement between the rails of the street railway company was separately estimated and assessed, not against the abutting property, but against the said company, which warrants the conclusion that the city was acting on the

presumption that the ordinance was a part of the contract. The action of the appellants is convincing on this point. The return states that they accepted these estimates as payment, and proceeded to collect of the property-owners the amounts assessed against the several parcels abutting on the improvement; that in some cases they gave receipts in full to the property-owners, and afterwards brought an action against the company to recover the cost of the pavement between the rails. It is true that it is alleged in the petition for the writ, that in January, 1890, a demand was made on the common council, for a correction of the estimates; but this was more than two years after the completion of the work and the collection of the assessments. There can be no doubt, in the light of the facts that are not traversed, but that during the time they were acting under and in pursuance of the contract, the appellants regarded the ordinance as forming a part of the agreement by which they were to be directed and controlled.

There is another view of the question. A large part of the argument of the learned counsel for the appellants consists of an effort to eliminate the ordinance from the contract, and to show that the latter must stand alone, unaffected by the ordinance. But it appears that the contract has more need of the ordinance than the ordinance has of the contract. The ordinance is the act of the common council. The contract is an agreement executed by the mayor of the city acting under its instructions. The council has authority to order street improvements, but the mayor is vested with no such authority.

The petition recites: "On the 11th day of July, 1887, the said council authorized the mayor to enter into a contract with the relator George Keith, to construct said pavement, and in pursuance of said authority, on the 12th day of July, 1887, William F. Woodson, who was

then the mayor of said city, on its behalf entered into the following contract."

The return of the city states: "That the said contract was awarded to said relator George Keith, and the council of said city instructed William F. Woodson, the mayor of said city, to enter into contract with said relator, Keith, and that on the 12th day of July, 1887, said Woodson, as mayor of said city, did enter into a contract with said relator Keith, for the furnishing of all materials and the constructing said improvement, as provided for in said ordinance, plans, and specifications."

The contract itself says: "In witness whereof, the said parties of the first part have executed this agreement by the mayor of said city of Michigan City, the day and year first above written, according to a resolution adopted by the common council of said city, July 11, 1887, instructing him to enter into such contract with said parties of the second part."

The contract is signed by William F. Woodson, mayor of Michigan City.

There is nothing in the record alleging that this contract was ever approved by the common council, so that, as it stands here, it derives its sole claim to be an agreement of binding force upon the city, upon the authority previously conferred upon the mayor to execute it. The mayor of a city can not give a contractor a lien upon the property of its citizens. Contracts made by him have no more binding force against the city than have those of a councilman. In the signing of this contract, the mayor was acting simply as the instrument or agent of the council, which alone has power to obligate the city. If then, in aught, he exceeded or varied from the authority which had been conferred upon him for a special purpose, his action to that extent was void as to the city, and the contract became the contract of the city,

only in so far as it complies with the instructions given to the mayor by the council when he was authorized to execute it.

The language last quoted from the return leaves no room for doubt as to what those instructions were which were given to the mayor by the council, and which were his only warrant for contracting at all. He was instructed to enter into the contract, which had already been awarded to the appellants by the acceptance of their bid, made in response to the publication of the city.

"The said contract was awarded to the said relator, Keith, and the common council instructed William F. Woodson, mayor of said city, to enter into contract with said relator, Keith."

All of this action was taken under the ordinance, and it certainly could not be claimed, with reason, that the mayor was authorized by these instructions, to enter into any contract differing from the ordinance by which the work was ordered.

The appellants say, in their petition: "The mayor entered into the contract in pursuance of this authority." Could he, in pursuance of this authority, have bound the city by a contract providing for a pavement of brick instead of cedar block, as ordered by the ordinance? Could he have contracted for a pavement sixty feet in width instead of fifty-four and a half feet in width, as specified in the ordinance? And if he had so contracted, would the court order the assessment of the extra cost against the abutting property? Certainly not; for the reason that his authority was limited to the agreements required by this ordinance, and for the further reason that the foundation for no other contract had been laid by the common council. The ordinance is the pillar which supports the contract. According to the record before us, it is the only action taken by the common

council, as a body, authorizing this improvement or justifying an assessment; and no action taken by any person or any other body can alter its specifications or amend its conditions.

The position here taken is only a part of the law of agency, but it has been frequently applied to municipal law by the text-books on that subject.

In Dillon on Municipal Corporations, section 447, fourth edition, the author says: "And it is a general and fundamental principle of law that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officers to make the contract." * * * "This principle is more strictly applied, and properly so, than in the law of private corporations. So, also, those dealing with the agent of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute."

Also from section 452 of the same work: "Where officers or agents of a corporation, duly appointed, and acting within the scope of their authority," sign an instrument, the instrument is to be regarded as the simple contract of the corporation. Note 2, under this section: "The general rule is unquestionable that a municipal corporation is not bound by the unauthorized acts of an individual, whether an officer of the corporation or a mere private person." *Davies* v. *Mayor of New York*, 93 N. Y. 250.

Where a committee was empowered to contract for the erection of a building at a price not to exceed a specified sum, it was held that they had no power to contract for a larger sum, and that the person contract-

ing with them was bound to take notice of the extent of their powers. *Turney* v. *Town of Bridgeport*, 55 Conn. 412.

In section 935 of the second volume of Dillon on Municipal Corporations, the rule is thus stated: "Nor, as we have before stated, is a municipal corporation bound by contracts, within the scope of its chartered powers, if made by officers or agents not thereunto authorized."

The cases cited by counsel for the appellants in this branch of his argument are not at all opposed to the doctrine stated.

In *Clements* v. *Lee*, 114 Ind 397, it is held that a person about to enter into a contract with a city must inform himself as to the jurisdiction of the council to contract.

Taber v. *Ferguson*, 109 Ind. 227, decides that, as the statute does not require the proof of notice by publication to be filed with the clerk, the transcript will not be held bad on demurrer for want of the notice.

In *City of Indianapolis* v. *Imberry*, 17 Ind. 175, the court holds that it is not necessary for the council to place of record its determination as to whether or not the general fund shall bear a portion of the cost of the improvement. We think these decisions are of no avail in determining what contract was made by the city, and what are its corporate obligations under the facts set forth in the return.

The third proposition submitted by appellants' counsel is, that the return of the writ furnishes no legal reason why the parties could not have contracted in total disregard and in ignorance of the provisions of the ordinance, which makes provision for the payment of a part of the cost of the improvement by the street railway company. In our opinion the ordinance sought to be disregarded became an essential part of

the agreement. It is the duty of the contractors to inform themselves as to the ordinance on which their claim is based, and which creates the lien on the property that insures payment for the work.

In *Clements* v. *Lee*, *supra*, it is said: "A person about to enter into a contract with a city council, must examine the records so far as to see that the common council has taken, or attempted to take, the steps necessary to enter into a contract."

In *Johnson* v. *Common Council of City of Indianapolis*, 16 Ind. 227, which was a suit for work done in grading and graveling a certain street, the action was defeated for want of a petition as required by the law of 1852. The court say: "Of this the contractor was bound to take notice; and, hence, the duty devolved upon him, before he took the contract, of ascertaining whether the council had so conducted the letting as to render the property-holders liable. It was also his duty to satisfy himself as to their ability to pay." In the case at bar there is a provision in the ordinance which relieves the property from its liability to pay the cost of the part of the pavement between the rails, of which the appellants were bound to take notice. But counsel claim for appellants, that they were justified in ignoring this provision, by the fact that it has no legal force; this is based on the assumption that the clause in the street railway company's franchise, adopted in 1886, gives the council no right to assess against the company the cost of the pavement between the rails. The clause reads: "Said street railway company shall plank, or otherwise and substantially pave the space between the tracks to the height equal to the surface of the rails laid by it." The acceptance of a franchise containing this clause, by the street railway company, would constitute an agreement to pave between the tracks. In *Western Paving and Supply Co.* v.

Citizens' Street R. R. Co., 128 Ind. 525, the court said: "It is settled that a charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city." "It is also settled that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city." They further say: "It seems to be settled that a street railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so, but the question as to whether it is compelled to improve the street as ordered by the city, in the absence of a contract to that effect, seems to be in some doubt." In the case under consideration there is a contract in the charter of the company to pave. In *Gilmore* v. *City of Utica*, 121 N. Y. 561, the question of the liability of the street railway company for a part of the care of the street pavement was raised by the action of a lot owner to restrain the collection of an assessment. The decision is to the effect that the provision in the charter granting to the common council power to assess the cost of paving between the rails against the street railway company, is permissive, and not mandatory, and, as the council saw fit to assess the whole cost against the abutting property, it was not a matter of complaint on the part of the property-owners. In the case at bar, the council adopted a plan exactly the reverse, and caused the cost of the pavement between the rails to be assessed against the street railway company.

Mention is made in this decision of a clause in the franchise, by which the railway company agrees to "re-

place and keep in good repair the pavement between its tracks, and at least two feet on each outer side."

The court say with reference to it: "The precise scope of the agreement growing out of the condition imposed upon the railway company is not clear, and it is open to doubt whether the company could be compelled to bear any portion of the expense."

But the doubt is occasioned by the language of the provision. It has been frequently held that an agreement to repair is not an agreement to pave anew.

In *Coast-Line R. Co.* v. *Mayor, etc.*, 30 Fed. Rep. 646, it is held that an ordinance containing provisions for paving, and accepted by the railway company, is a contract between the city and the company, and a subsequent statute enacted by the Legislature, increasing the amount of pavement to be paid for by the railway company, impairs the obligation of this contract, and is void.

In *State* v. *Mayor, etc.*, 30 N. J. Law 225, the rule is laid down substantially as follows: The mayor and common council have no authority to impose regulations upon, and exact a license from, a street railway company. Such powers must be found, if they exist at all, as a condition annexed to the grant of the franchise of the company or in the grant of a legislative power to the city by the Legislature, and in this case both grounds are wanting.

In *District of Columbia* v. *Washington, etc., R. R. Co.*, 1 Mackey (D. C.), 361, the court held that under an agreement in the franchise of the company to keep the space between the rails well paved, the company would be liable for that portion of the pavement laid on the street by the city. *Niklaus* v. *Conkling*, 118 Ind. 289; *People, ex rel.*, v. *Gilon*, 126 N. Y. 147; *Sioux City St. R. W. Co.* v. *Sioux City*, 39 N. W. Rep. 498; *Fort St., etc., R. R. Co.* v. *Schneider*, 15 Mich. 74; *Mayor, etc.*, v. *Second*

Ave. R. R. Co., 31 Hun (N. Y.) 241; *City of Philadelphia* v. *Ridge Ave. Pass. R. W. Co.*, 143 Pa. St. 444; *State, ex rel.*, v. *Jacksonville St. R. W. Co.*, 10 Southern Rep. 590.

In Elliott Roads and Streets, p. 405, it is said: "Private corporations must take notice that the authority to improve streets is a continuing one, and it should be held that they use the streets subject to the authority, and charged with the duty of making the part occupied by them correspond with the adjoining parts. They accept the privilege of using the street upon the implied condition that they will do in the matter of improvements what adjacent land owners are required to do. The principle which applies to such cases is essentially the same as that which rules in cases where railroads cross or occupy ordinary highways. * * * The duty of paying the cost of the improvement having been assumed by the private corporation, it no longer rests upon the landowner for the landowner's obligation does not arise out of a duty to keep the street safe, but from the fact that his property has received a special benefit. * * Put the case upon the broad and equitable principle that he who receives the benefit must bear the burden, and it becomes at once apparent that the street railroad company should pay the cost of improving the highway."

If it may be said that the contract with the street railway company, created by the ordinance of 1886, left it to the judgment of the council whether they would assess the cost of this pavement between the rails against the railway company or against the abutting property, the fact remains that in this instance the council exercised its discretion, and ordered the cost to be assessed against the street railway, thus enforcing its rights under the franchise. The ordinance in question being a

part of the contract, the relators' petition is an application to the courts for relief from the results of their own agreement. It demands of the court that it shall, by mandate, compel the council to issue an assessment against the abutting property, which the council provided should be issued against other property. The franchise granted to the Citizens' Street Railway Company in 1886, the ordinanee ordering the improvement, and all other proceedings of the council in connection with the proposed work were matters of public record at the time the contract was executed, and presumably in the knowledge of the appellants who made their agreement with reference to it.

The improvement in question could only be made on the order of the common council. The assessment for its cost can be directed only against the specific property designated in the ordinance. This being so, the assessment for the cost between the rails of the street railway can not attach to the abutting property when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay.

We are of the opinion that the cost of the pavement between the rails should be borne by the company, and not by the abutting property; that mandate should not issue to compel the appellees to assess this portion of the cost of the improvement otherwise than is provided by the ordinance; that the facts set out in the return to the alternative writ are sufficient, and that the decision of the court below in overruling appellants' demurrer thereto was not erroneous.

The judgment is affirmed.

Filed June 21, 1894.

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WHITNEY ET AL. *v.* MARSHALL.

FORMER ADJUDICATION.—*Decree as to Matters Outside the Issues.—Fraudulent Conveyance.—Inchoate Interest of Wife.—When can not be Sold.*—Where the only issue presented in a suit as to setting aside as fraudulent as against the husband's creditors a conveyance to the wife, and to subject the land to the payment of the husband's debts, and the court found for the plaintiffs, and in addition to decreeing the conveyance fraudulent and setting it aside and subjecting it to the payment of the husband's debts, the court decreed that the wife's inchoate interest therein be sold and forever barred, that part of the decree relating to the inchoate interest of the wife was outside of the matters submitted to it by the pleadings of the parties, is not *res judicata*, and is not conclusive or binding on the parties.

FRAUDULENT CONVEYANCE.—*Real Estate.—Inchoate Interest of Wife.—Land Bought with Husband's Money and Fraudulently Conveyed to the Wife.—Judicial Sale.—Partition.*—Where real estate is bought with the husband's (A's) money and he fraudulently procures the vendor to convey the same to his (A's) wife, if such conveyance be held fraudulent, and the land subjected to the payment of the husband's creditors, the wife is entitled to her inchoate interest therein, and is entitled to partition of the same when the title in the vendee under the judicial sale becomes absolute.

From the Vigo Superior Court.

B. E. Rhoads and *E. F. Williams*, for appellants.

C. R. Trowbridge and *T. W. Harper*, for appellee.

MCCABE, J.—The appellee sued the appellants in the court below to obtain partition of certain real estate in Vigo county, describing it, and alleging that she was the owner in fee simple of the undivided one-third thereof, and that appellants owned the other two-thirds in fee as tenants in common with her.

Appellants answered by a general denial, and filed a cross-complaint on which issues were formed, in which cross-complaint they set up a former adjudication in a suit between them and appellee in the United States Cir-

cuit Court for the district of Indiana, by which they claimed that appellee was adjudged to have no title whatever in said real estate, and in which adjudication said real estate was ordered to be sold to satisfy a judgment in favor of appellants and against appellee's husband, James A. Marshall, and that they purchased under such decree. A trial resulted in a finding and judgment of partition, requiring one-third of said real estate to be set off to appellee and the other two-thirds to the appellants.

The overruling of the appellants' motion for a new trial is the only error properly assigned. The grounds assigned in the motion are, that the finding is not sustained by the evidence, and is contrary to law.

The record shows that the real estate in controversy was purchased and paid for by the husband of appellee, the title being taken in the name of the appellee, his wife, while he was in failing circumstances, and for the purpose of hindering, delaying and defrauding his then existing creditors, among whom were the appellants.

The appellants thereupon brought suit against said James A. Marshall, in the Vigo Superior Court, to collect their debt against him, and attached the real estate now in controversy, treating the same as fraudulently conveyed to his wife, and subject to attachment against him.

That suit was, on petition of appellants, removed for trial into the circuit court of the United States for the district of Indiana.

That case was put at issue and tried in the latter court, resulting, on the 29th day of September, 1887, in a judgment in favor of appellants and against said James A. Marshall, for $6,029.65, with an order for the sale of the attached property, that being the real estate now in controversy, to satisfy said judgment. Mrs. Marshall, the appellee here, was not a party to that suit.

The proper order of sale was issued and placed in the hands of the United States marshal, and thereupon Mrs. Marshall began a suit in the superior court of Vigo county against the present appellants to quiet her title to the real estate now in controversy here. Her complaint was in a single paragraph in the usual form.

Further proceedings looking to a sale by the marshal until that suit could be determined were suspended by the marshal, presumably at the request of the judgment plaintiffs, the present appellants.

On their petition, the suit of Mrs. Marshall to quiet title was also removed for trial into the United States Circuit Court for the district of Indiána. In that court the then defendants, the present appellants, filed an answer and a cross-complaint against Mrs. Marshall. The substance of that cross-complaint is that the then cross-complainants had recovered the judgment already mentioned, stating the specific description of the indebtedness upon which the judgment had been founded; it also stated that they had in that proceeding charged that said James A. Marshall was then conveying and disposing of, and had conveyed and disposed of, his property with a fraudulent intent to cheat, hinder and delay his creditors, upon which they had caused the real estate in question to be attached; that issues were formed upon said cross-complaint against Mrs. Marshall, resulting in a finding and judgment in their favor specifically decreeing the sale of said property to satisfy the judgment theretofore recovered against her husband.

Their cross-complaint further alleged that at the time of said conveyance, and at the time of said suit, the said James A. Marshall had no other property in the State of Indiana subject to execution, and that the said conveyance was made with the fraudulent purpose to cheat, hinder and delay his creditors, of all of which facts the

plaintiff, Mrs. Marshall, had knowledge, and to all of which fraudulent acts of her husband she was a party; that said judgment remained wholly unpaid and unsatisfied, and that the order of sale already mentioned was still in the hands of the marshal unexecuted and unsatisfied; that said James A. Marshall was a nonresident of the State of Indiana, and that he has no other property out of which defendants' judgment may be made; that said property is worth less than $4,000, and subject to a mortgage of $2,200; that said property is the proceeds of a certain stock of goods owned by said James A. Marshall, and for which he received the said real estate, taking the title thereto in the name of his wife, the complainant, without any consideration moving from her to him.

Prayer that the title to the said real estate be quieted in James A. Marshall, and that the same be sold to satisfy said judgment, and proper relief.

On the hearing, the federal court dismissed Mrs. Marshall's complaint to quiet title, and found that the allegations of the cross-bill just mentioned were true and sustained by the evidence.

Upon this finding, a specific decree and judgment was rendered, setting forth the relief granted, among which is the following, viz: "It is further adjudged and decreed by the court that if the said complainant (Mrs. Marshall) shall not pay the judgment heretofore rendered in this court against the said James A. Marshall, her husband, as appears of record in law order-book 5 of this court, page 369, *et seq.*, within ten days from the date of this judgment, then said property, to wit: (describing it) be sold as other lands are sold upon execution, to be issued upon the said judgment without relief from valuation or appraisement laws, * * * and that all claim, right, title or interest of any kind of the

said Nannie A. Marshall in and to said real estate be forever foreclosed, barred and cut off by said sale, and that the purchaser have full and complete title to the entire property, as against said Nannie A. Marshall and James A. Marshall, and any person claiming by, through or under them, or either of them."

After the rendition of the foregoing decree, the marshal sold the real estate to the judgment plaintiffs, the present appellants, and afterwards, at the proper time, executed to them a deed conveying said real estate to them pursuant to said sale.

After that, Mrs. Marshall, the present appellee, began this suit for partition, claiming that under the statute she was entitled to one-third thereof. It provides that "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof."

It then provides that she may have partition. 1 Burns' R. S. 1894, section 2669; R. S. 1881, section 2508.

The controversy here is narrowed down to two propositions urged by the appellants' learned counsel, either one of which, if tenable, would establish that the finding in favor of the appellee is not sustained by the evidence and is contrary to law.

One of those propositions is that the decree of the Federal court directed appellee's inchoate interest to be

sold or barred by virtue of the sale; and the other is that the appellee never had any inchoate interest in the real estate in question because her husband never owned it, and on his death, for that reason, no part of it could have descended to her. There can be no doubt that the language of the decree above quoted was intended to have the effect to direct the inchoate interest of the appellee to be sold or barred, and if that decree is effective in accomplishing its object, then the finding of the trial court was both contrary to law and unsustained by the evidence. If that part of the decree is valid, then appellee's inchoate interest, if she had any, was sold and barred.

But it is contended, on behalf of the appellee, that such part of the decree is not valid. It will be observed that appellee's complaint to quiet title was as hostile to an inchoate interest in herself as it was to any interest that the then defendants, the present appellants, may have had in the real estate. Her complaint claimed that she owned it in fee-simple and made no other claim to it. It is difficult to see how an adverse decision on such single claim, her husband still living, could involve an adjudication against her inchoate interest. Be that as it may, it is sufficient to say that her complaint on the hearing was dismissed for want of equity, and the whole judgment and decree was founded upon the cross-bill of the then respondents, the present appellants. That cross-bill stated no fact invoking the judgment or decree of the court ordering her inchoate interest sold or barred by virtue of the sale. It proceeded wholly on the theory that the purchase of the real estate in controversy with her insolvent husband's means, and the taking the title in her name was designed by them both to defraud his creditors, and that such conveyance was fraudulent as against such creditors, among whom were the then cross-

complainants, and that such conveyance ought to be set aside and the title quieted in such insolvent debtor, James A. Marshall, and the property subjected to sale on execution against him to satisfy said judgment. No other relief was asked, no other relief was prayed for, and no other relief was within the scope of the pleading upon which the judgment was founded. It is very clear, therefore, that that part of the decree we are considering was outside of the issue and had no pleading on which to rest.

In *McFadden* v. *Ross*, 108 Ind. 512, at pages 516, 517, it was said: "The proposition, that the judgment of a court having jurisdiction of the parties and the subject-matter, is conclusive, has become a settled maxim of the law. This, however, means nothing more than that such judgment is conclusive upon all questions which were, or might have been, litigated and determined within the issues before the court. Neither reason nor authority lends any support to the view, that because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested, whether it be involved in the pending litigation or not. 'Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises.'" Citing *Munday* v. *Vail*, 34 N. J. 418; *Fairchild* v. *Lynch*, 99 N. Y. 359; *King* v. *Chase;* 15 N. H. 9, 41 Am. Dec. 675; *Wood* v. *Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Smith* v. *McCool*, 16 Wall. 560; Bigelow Estop., p. 92.

To the same effect are *Indianapolis, etc., R. W. Co.* v. *Center Township*, 130 Ind. 89; *Mitchell* v. *French*, 100 Ind. 334; *Hays* v. *Carr, Admr.*, 83 Ind. 275; *Hulls* v.

Martin, 134 Ind. 587; Freeman on Judgments (4th ed.), section 120; 21 Am. and Eng. Encyc. of Law, 232, 233, 234, and authorities there cited; *Ringgenberg* v. *Hartman*, 124 Ind. 186.

It has been suggested that the appellee's inchoate interest had not yet arisen or accrued, and that it could not be the subject of litigation or adjudication. But that position is untenable, because the express terms of the statute authorizes the court, at least by implication, to direct, in a proper case, such interest by the judgment to be sold or barred. It has also been suggested that the court may have adjudged, as matter of law on the facts alleged in the cross-bill, and presumably proven, that the title never having been vested in appellee's husband, James A. Marshall, she never had any inchoate interest in the real estate in question.

It is a sufficient answer to that suggestion to say that no such subject for adjudication was presented by the pleadings in the suit to quiet title in the federal court. The present appellee, in her complaint to quiet title, made and set up no claim to an inchoate interest, but her claim was antagonistic to such interest. At all events, she nowhere affirmed the existence of such an interest. The cross-complainants, the present appellants, in their cross-complaint in no way denied or controverted such an interest in her. Their cross-complaint in the federal court sought to quiet the title in her husband and nothing else. To do that would establish her inchoate interest, and not destroy it. Had they been seeking to quiet title as against her inchoate interest, it would have been material and pertinent, if not necessary, for them to have alleged that Mrs. Marshall was making some claim to an inchoate interest. It is very clear, from their cross-bill, that they did not intend to take any such position against Mrs. Marshall, because her complaint

in the case, claiming the title in fee-simple, made it impossible for them to prove that she was asserting a claim to an inchoate interest. There was, therefore, no issue involving the question whether or not, on the facts alleged, she had an inchoate interest. The judicial power of the court was not invoked upon that question by any pleading. All the court was asked to adjudge was whether, upon the facts alleged, the conveyance to Mrs. Marshall was fraudulent as to creditors, and whether the property conveyed to her by her husband's vendor was liable to be subjected to sale to satisfy appellants' judgment.

We are therefore of opinion that the part of the decree of the federal court we are considering, being outside of the matters submitted to it by the pleadings of the parties, is not *res judicata*, and is not conclusive or binding on them.

It remains to inquire whether appellee, Mrs. Marshall, after the sale under the judgment and order of the federal court, had such an inchoate interest in the real estate sold as brought her within the purview of the statute quoted.

It has been held that a sale on an adjudication and order of a federal court is a judicial sale within the meaning of the statute in question. *Roberts* v. *Shroyer*, 68 Ind. 64; *Ketchum* v. *Schicketanz*, 73 Ind. 137; *McCracken* v. *Kuhn*, 73 Ind. 149.

But it is contended by the appellants that as the legal title was never in James A. Marshall, appellee's husband, but was conveyed directly by the vendor to Mrs. Marshall, she could not, either on the death of her husband or on judicial sale of the real estate, have any interest in it.

This contention is greatly strengthened when we are reminded that it is settled law that a conveyance for the

purpose of defrauding creditors can only be taken advantage of by such creditors, it being valid as to the parties and all other persons. And that the theory of the action for relief by the creditors is not to annul the deeds and revest the title in the original grantor, but to subject the property to sale to satisfy the creditors' just demands. *Stout* v. *Stout*, 77 Ind. 537; *Springer* v. *Drosch*, 32 Ind. 486; *O'Neil* v. *Chandler*, 42 Ind. 471; *Edwards* v. *Haverstick, Admr.*, 53 Ind. 348; *Garner* v. *Graves, Admr.*, 54 Ind. 188; *Etter* v. *Anderson*, 84 Ind. 333; *Anderson* v. *Etter*, 102 Ind. 115; Bump on Fraud. Conv., 443–445, and authorities there cited.

If the claims of creditors are satisfied, a fraudulent conveyance remains in full force. *State Bank* v. *Davis*, 4 Ind. 653.

Nevertheless it is now well settled by the decisions of this court under the statute in question that where real estate is fraudulently conveyed by the husband by deed in which his wife shall join, on subjecting the same to sale to satisfy creditors, the wife's inchoate interest of one-third becomes absolute and vested in her whenever the legal title to the other portion thereof, by virtue of such sale, becomes absolute and vested in the purchaser thereof. *Ketchum* v. *Schicketanz, supra; Mattill* v. *Baas*, 89 Ind. 220; *Rupe* v. *Hadley*, 113 Ind. 416.

A literal and strict construction of the statute would forbid such a holding. But the statute has been regarded as remedial and entitled to a liberal construction.

The statute has been construed, also, to apply to a case where there has been a judicial sale of the husband's lands, to which he had no other than an equitable title. *Shelton* v. *Shelton*, 94 Ind. 113; *Keck* v. *Noble*, 86 Ind. 1.

In a case where the husband and wife have joined in

a deed of conveyance of his lands which is afterwards adjudged fraudulent as to creditors, she is in no better situation to claim her inchoate interest in the land than in the case at bar, where the title was never in the husband, but which he fraudulently procured the vendor to convey to his wife. In neither case is the title actually in the husband at the time the inchoate interest is held to take its rise in the cases referred to, but, in both cases, is in the fraudulent grantee.

The reason given for such ruling in *Rupe* v. *Hadley*, *supra*, at page 422, is that "in such case, if the deed is void and ineffectual to convey the husband's real estate, it must be held that such deed is also void and ineffectual to convey, bar or release the wife's inchoate interest in such real estate, in the event she survives her husband, or in the event that such real estate is sold and conveyed as the husband's property, under a judicial sale thereof, and his title thereto becomes absolute and vested in the purchaser thereof at such sale."

In *Mattill* v. *Baas*, *supra*, at page 224, it is said: "As to creditors, it neither benefited the husband nor prejudiced the wife. In all respects, as between the bankrupt and his wife upon one side, and the creditors upon the other, the conveyance to Sparcke is to be regarded as though it had not been made."

The same reasoning may be applied here. The conveyance of the real estate in question to appellee, instead of being made to her husband by his vendor, neither benefited the husband nor prejudiced his wife, because appellants, as creditors of her husband, have procured a court of equity to deal with the property judicially in all respects as if the conveyance had been made to the husband instead of the wife. They have asked that court and it has complied with their request, and applied the maxim that equity will treat that as having been done

which ought to have been done, namely, that the deed ought to have been made to the husband instead of to the wife. Upon the grant of this just and equitable request they were permitted to expose at marshal's sale and buy in the real estate. And now that the wife proposes to regard the sale as based on the equitable principle they invoked, and without which they could not have had a sale or purchased any part of the property, they propose to repudiate the equitable principles upon which they reached their vantage ground.

There is another good reason that supports and upholds all that class of cases that awards to the wife an inchoate interest in the lands of her husband fraudulently conveyed and subjected to the payment of his debts, since the enactment of the statute in question; and it is this: The creditors have no right, since the enactment of that statute, to subject more than two-thirds of a married debtor's real estate, where it does not exceed in value $10,000, to sale on execution to pay their debts. When they come into a court of conscience and complain of a fraudulent conveyance of their married debtor they can, in good conscience, ask no more, and a court of conscience can grant no more than to restore to them all the rights they had before the wrong was done by their debtor—all the rights they had before the fraudulent conveyance was made, and that is to subject two-thirds of his real estate to the payment of their debts. That places them precisely in the position they would have occupied if the fraudulent conveyance had never been made; and in the case at bar, it places the appellants in the same position they would have occupied if the conveyance had been made to the husband, their debtor, instead of having been made to appellee, his wife. In that case they would have been legally entitled to subject two-thirds of the real estate in question to sale on

execution to satisfy their judgment and no more. There is neither law nor equity in their demand that they should receive more than that which they had when their debtor's wrong was done—should receive more than his wrong took from them.

By the finding and judgment of the trial court, they are restored to all the rights they had before the fraudulent conveyance was made. We are of opinion that the finding was well supported by the evidence, and was not contrary to law.

The judgment is affirmed.

Filed June 5, 1894.

No. 16,748.

REID *v.* KLEIN ET AL.

DESCRIPTION. — *Deed.* — *Conveyance.*—*Real Estate.*—"*South Line of Street.*"—"*North Line of the Railroad Track.*"—In a deed of conveyance was the following description: "Beginning on a line dividing the northeast quarter of section 15, township 20, range 10 east, at a point ranging with the south line of Adams street, Muncie; thence south with said quarter section line to the north line of the 'railroad track;' thence eastwardly far enough to make three acres by a line from thence north to a point running with said street aforesaid, and therewith westwardly to the place of beginning." Questions: (1) Where is the starting point of the description? in the south line of the street as it then was (45 feet wide), or in the south line, as shown by the recorded plat (60 feet wide)? (2) What was the terminus of such line on the south, designated by the words "north line of the railroad track?"

Held, (1) that the starting point of the description was in the south line of the street as established by the recorded plat.

Held, (2) that such line terminated at the north rail of the railroad track, the terms "railroad track" and "railroad right of way" having separate and distinct meanings.

Held, also, that when anything exists to meet the call, an ambiguity can not exist.

Reid *v.* Klein *et al.*

SAME.—*When can not be Varied by Extrinsic Evidence.*—Where there is no equivocation in the language of a description, and there are present objects, monuments, lines, streets or places answering the call in the deed, no ambiguity exists, and the rule applies that the effect of a written instrument can not be varied by extrinsic evidence.

CONTRACTS.—*Written.—Duty of Court to Construe.—Ambiguity.—Evidence as to Situation, etc., of Parties.—Practice.*—In cases arising out of written contracts or instruments it is always for the court to construe the language and make the interpretation, and it is for the purpose of informing the court's mind, when he thinks there is ambiguity in the instrument, that evidence is heard as to the situation of the parties and their surroundings, in order to construe it and lay down the rule concerning their rights thereunder.

From the Delaware Circuit Court.

J. N. Templer, *J. F. Duckwall* and *E. R. Templer*, for appellant.

J. W. Ryan and *W. A. Thompson*, for appellees.

DAILEY, J.—This was an action brought by the co-appellees, Henry C. Klein, Ila T. Lake, Richard McGauley and Eugene Kelly, as plaintiffs, against appellant, as sole defendant, in the court below, to quiet title to, and for possession of, certain real estate situated in the city of Muncie, Delaware county, Indiana, described in the complaint.

The complaint is in three paragraphs, the first and third of which are for possession, and the second to quiet title. The appellant demurred to the first and second paragraphs of the complaint for want of sufficient facts, which demurrers were overruled, and the appellant reserved exceptions thereto.

Afterwards, upon leave granted by the court, Sarah H. Kirby, Thomas H. Kirby, Martha A. Hamilton, John M. Kirby, Elizabeth K. Heinsohn and George Kirby entered their appearance as defendants to this action and filed their cross-complaint against the plaintiffs and the appellant, claiming title to a part of the real estate de-

scribed in the complaint, and making the usual averments in relation thereto.

The appellant filed his answers in general denial to the complaint and to the cross-complaint of the Kirbys, Hamilton, and Heinsohn. The appellant also filed his cross-complaint against the plaintiffs and his codefendants, being the appellees, in two paragraphs, to quiet his alleged title to the property in controversy. The plaintiffs answered appellant's cross-complaint by denying the same. At this point, the plaintiffs filed the third paragraph of complaint; thereupon appellant filed a third paragraph of cross-complaint against all the appellees. These were answered by general denial. The cause being at issue, it was submitted to the court for trial without a jury.

Afterwards the court made a finding for the appellant for all the lands not claimed by the appellees; for the Kirbys, Hamilton and Heinsohn for the land in dispute, being, as found by the court, a strip off the east side of appellant's land, $8\frac{34}{100}$ feet wide east and west and extending from the south line of Adams street, in the city of Muncie, south to the north line of the C., C., C. & I. R. R., and against the appellant and all others claiming any interest therein.

The appellant then moved for a new trial, and at the next term the court refused the same, to which ruling he excepted. The court then rendered a judgment in accordance with the finding. The appellant afterwards was granted a new trial as of right. Upon affidavit and motion, a change of judge was had, and the cause was again tried, resulting in a finding for the appellant for all the land not claimed by the appellees—for the Kirbys, Hamilton, and Heinsohn for the land in dispute, being a strip eight and $\frac{89}{100}$ feet wide east and west, and extending from the south line of Adams street, in the

city of Muncie, south to the north line of the railroad track of the C., C., C. & I. R. R. The court refused a new trial, to which the appellant excepted, and rendered final judgment in accordance with the finding. The appellant has assigned two errors. First, the court erred in overruling appellant's motion for a new trial. Second, the court erred in rendering judgment in favor of the plaintiffs and against the appellant for the costs of suit, or any costs at all.

At the date of the deed from Thomas Kirby to the Reids he was the owner of a tract of land bounded on the north by what is now Adams street, in Muncie; on the west by the half section line, on the south by the track of said railway, and on the east by what is now Beacon street. On the first day of October, 1850, Thomas Kirby conveyed a part of this tract to appellant, John S. Reid, and others, by the following description: "Beginning on the line dividing the northeast quarter of section 15, township 20, range 10 east, at a point ranging with the south line of Adams street, Muncie; thence south with said quarter section line to the north line of the 'railroad track;' thence eastwardly far enough to make three acres by a line from thence north to a point running with said street as aforesaid, and therewith westwardly to the place of beginning."

The controversy in this case arises concerning the starting point of this description and the terminus of the line on the south, designated by the words "north line of the railroad track." The appellant, Reid, claims that the starting point is in the half section line at a point "ranging" with the south line of Adams street, as it then was, which he insists was, at the time, but forty-five feet wide; that Adams street then extended no farther east than Madison street; that Coffeen's addition had been platted about one year prior to this, and the plat had

been recorded, but there was no Adams street visible east of Madison street. In this addition Adams street was platted sixty feet in width.

The court below decided that the starting point described in said deed is at the south line of this street, as laid out in this addition.

The next point of controversy is concerning the southern boundary, or as to the meaning intended by the words "the north line of the railroad track." The appellant claims that the southern boundary is the north line of the right of way of the railroad company. The court decided that the southern boundary is the north rail of the track.

It seems the question presented is one of law, arising upon the language employed in the deed. If the trial judge was right in holding there was no ambiguity in the language of the deed of Thomas Kirby to John S. Reid and his co-grantees, that ends the entire controversy. Such language would then fix the rights of the parties. Here the subject for investigation was, did an ambiguity exist in the description? It is appellant's claim, as we understand it, that the range which was to locate the north line of the disputed tract was with a fixed line of a street extending westward from Madison street as the starting point, and not the south line of the same street running eastward from Madison street.

The contention grew out of the fact that prior to January 2d, 1850, the east boundary line of Muncie was Madison street, running north and south; and that in the town, as then existing, Adams street extending east and west, was forty-five feet in width; and that after January 2d, 1850, in Coffeen's addition and extension, eastward of the town of Muncie to Hackley street, as shown on the plat, Adams street was projected eastward to Hackley street, and through the addition 60 feet wide, instead of

45 feet wide, as in the old town. East of Hackley street, which is located along the line dividing the northeast and northwest quarters of section 15, and entirely outside the town limits, lay the lands of Thomas Kirby, at the date of the deed containing the alleged ambiguous description.

When this deed was made, Coffeen's addition lay between the land conveyed and Madison street, where Adams street ended in the old town, twelve hundred feet from the quarter-section line. Its plat had been of record nearly a year. It had become as much a part of the town as any other portion, and its street, lines, and lots as visible, certain and fixed as the lines and surveys of the public lands, or the exterior limit of any survey which is merely an imaginary course or direction from point to point and nowhere visible. The line of Adams street in Muncie, at the date of the deed, was as definite as any such line could be.

It is presumed that a court construing a deed which made the south line of a street in the recorded plat of a town a starting point, would take the point to be the one found on the record provided by law, which was in existence at the time. No doubt the court took the place and position of the parties and the attending circumstances and conditions existing when the deed was made, and, as a result, the experiment is against appellant.

Tracing the description, "commencing on the line between the northeast and the northwest quarter of section 15, at a point 'ranging' with the south line of Adams street," it would seem the word "ranging" was used naturally because the exact location of the south surveyed line of Adams street was doubtless difficult of exact location.

It is reasonable to suppose the grantor knew he could not fix a boundary line in the public streets, because he

could not extend the lines of his premises into the known territory of another's land. It also seems that he did not want to reduce Adams street from 60 to 45 feet wide, as he had then in contemplation an addition to Muncie east of Coffeen's, into and through which said street would be projected, and which he afterwards laid out, platted and dedicated with Adams street, 60 feet wide. He could not have had in contemplation his addition to Muncie, extending Adams with other streets, the location of the appellant's north boundary fifteen feet in the street for the length of two or three hundred feet, in the identical space he intended for a projection of that very street.

Had Mr. Kirby intended 45 feet as the width of Adams street in making his description, he would have done an unjust and dishonest act in afterwards cutting the appellant's line off 15 feet by platting Adams street 60 feet wide in dedicating his addition to the town.

Appellant's learned counsel say: "No line was visible as the south line of 'Adams street' till the eye reached Madison street."

In this we think they are mistaken. Adams street was "visible," if at all, to the parties, just where its line was marked and indicated by the Coffeen plat—at its intersection of the line between the northeast and northwest quarters of section 15. The fact that the plat of Coffeen's addition had been recorded before the deed was made, was held by the court to make Adams street a fixed monument, of which the parties had notice, and the language of the deed had reference thereto.

Appellant, in support of his theory, relies upon the case of *Cleveland* v. *Obenchain*, 107 Ind. 591, in which it is said: "Where land is described as bounded by an existing road or street, it is to be construed as referring to one actually opened and in use by the public."

Counsel argue that Adams street, at Madison street, was in the minds of the parties in describing the disputed lands. If so, it could not have formed one of the boundaries of the land sold 1,200 feet distant, between which and Adams street, Coffeen's addition lay. The authority cited is that where a road or a street is a boundary, the line of the street or road as actually used, governs. This doctrine is applicable to a case where there is a difference between a highway as used and as laid out. We do not feel warranted in overthrowing the court's statement that this recorded plat constituted notice to all persons. Its dedication, record, etc., made Adams street as much a fixed monument as the lines of any lot in the addition. If it had been the intention or purpose to make the south line of Adams street, where it joined Madison, the north line of the land conveyed, it could easily have been said, "commencing at a point in the line separating the two quarter sections of land intersected by a right line projected eastward from the south line of Madison street in Muncie."

The learned counsel for the appellant say it is a cardinal rule that when two or more monuments will answer the call in a deed, the court will endeavor to ascertain which was meant.

The rule is correctly stated, but we think this case does not come within its meaning. Here Adams street was existent when the deed was made as a lawful monument, and so identified that the court was bound to respect it. There could be no confusion where one was present perfectly filling the call, and the alleged monument is a long distance away, and not even on adjoining or contiguous territory. When anything exists to meet the call an ambiguity can not be present. If, when this deed was executed, Coffeen's addition and plat had not been annexed to the town bearing Adams street upon it,

its width specified, and the language of the deed still had been "ranging with the south line of Adams street in Muncie," it would be proper to seek the nearest point in the south line of said street, and there would be a valid reason in appellant's contention. Courts can not find ambiguities where none exist.

"A written instrument is not ambiguous or uncertain because an * * * uninformed person may be unable to interpret it. It is ambiguous only when found to be of uncertain meaning by persons of competent skill and information." 1 Greenl. Ev., section 298.

There being but one description of land in the deed in controversy, there is no reason to invoke the rule in *Casper* v. *Jamison*, 120 Ind. 58.

In cases arising out of written contracts or instruments, it is always for the court to construe the language and make the interpretation, and it is for the purpose of informing the court's mind, when it thinks there is an ambiguity in the instrument, that evidence is heard as to the situation of the parties, the surroundings, etc., in order to construe it and lay down the rule concerning the party's rights thereunder.

In *Seavey* v. *Shurick*, 110 Ind. 494 (497), it was said: "Where words of ordinary signification are found in a contract, it is for the court to give an interpretation to such words, as well as to the whole contract. It is only where a word or phrase as used in a particular trade or calling has a meaning peculiar to such trade, and different from the ordinary sense in which it is used, that evidence may be heard to explain the use of the word."

A leading case in this State on the subject of the admissibility of evidence *dehors* the instrument to explain it, is *Harris* v. *Doe, on Demise*, 4 Blackf. 369, and the test there stated is: "When such an instrument * is a grant * and is so equivocally expressed as to render it doubtful

to what object it refers, or it is evident a mistake has been made * as to boundaries, resort may be had'' to parol evidence.

On the contrary, where there is no equivocation in the language of the description, and there are present, objects, monuments, lines, streets or places answering the call in the deed, no ambiguity exists, and the rule applies that the effect of a written instrument can not be varied by extrinsic evidence. *Durland* v. *Pitcairn*, 51 Ind. 444; *Symmes* v. *Brown*, 13 Ind. 318.

As to the contention that there is a second ambiguity in the description of the land conveyed, in the words fixing the south end of the west line of the tract, such point being written "the north line of the railroad track," the court probably thought the language was plain, and indicated a fixed, well known, and located point.

The evidence is, that in October, 1850, the "track" of this railroad itself was staked and largely graded and made ready for the iron rails, and the right of way eighty feet wide was cut out of the woods. If the grantor and grantee intended the north line of the right of way as a boundary or monument, they could have employed an appropriate term to express the purpose. In view of the fact that in every railroad charter passed by the Legislature of this State prior to the general railroad law, also in the general law and every act since, the words "railroad track" and "railroad right of way" have separate, distinctive meanings, it is too late to argue that they could be convertible terms.

"In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument." Broom's Legal Maxims (6th ed.), 456.

"Where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt * such instrument is

always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties * * * is inadmissible." *Shore* v. *Wilson*, 5 Scott, N. R. 958 (1037); Broom's Legal Maxims (6th Am. ed.), 457.

It seems from the record, that the railroad company in fact never did have or acquire, except by user, any right of way from Thomas Kirby through the lands of which those in the deed were a part; and until it had secured a definite right of way, he had hold and could convey to the rail or edge of the track as laid out. All law writers and courts preserve a clear distinction between the terms "right of way" and "railroad track." Mills Em. Dom. (2d ed.), section 211, says: "There is a vast difference between the location of a right of way and the location of a track on a right of way."

In *Boston, etc., R. R. Co.* v. *President, etc.*, 52 N. Y. 510, the court say, in construing a statute authorizing railroad tracks to be crossed by streets without compensation: "Grounds upon which tracks are laid for storing cars, or exclusively for making up trains, are not embraced in the term 'track,'" and the term should be limited to the track for public traffic, whether one or more tracks, what may be fairly regarded as the roadway. In the Cent. Dictionary, railroad track is defined thus: "The two continuous lines of rails on which railway cars run, forming, together with the ties, ballast and switches, etc., the permanent way."

It will be observed, by reference to the Kirby deed, under which the appellant disputes the claim of the Kirbys, Hamilton and Heinsohn, that it was made to Joseph A. Reid, John S. Reid, William T. Right and Benjamin F. Reid. Later on, in 1854, Wright, one of the grant-

ees, sold and conveyed to the appellant his interest in the original purchase, by the same description, to "north line of the railroad track," referring to the Kirby deed for more particular description.

In 1868 another original grantee from Kirby sold to appellant his interest, and conveyed the same by a like description.

It seems by the deed of Joseph A. Reid to John S. Reid, that the defendant treated Adams street, in Coffeen's addition, as "in the town of Muncie," and "sixty" feet in width.

In 1854, by the deed of William T. Wright and others, the appellant took their interest in the same tract. The meaning of the deed in controversy is to be determined by the construction put upon it by the parties, and what that construction was is a question of the weight of the evidence to be determined by the trial court. We think the record presents no question challenging the judgment. No motion was made in the court below to modify or change it, nor was any exception taken to its form. *Jemison* v. *Walsh*, 30 Ind. 167; *Smith* v. *Dodds*, 35 Ind. 452; *Pierce* v. *Wilson*, 48 Ind. 298; *Richardson* v. *Howk*, 45 Ind. 451.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed June 7, 1894.

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143 576
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No. 16,445.

THE BIG CREEK STONE COMPANY *v.* WOLF, ADMINISTRATRIX.

PLEADING.—*Complaint.—Master and Servant.—Defective Appliance.—Personal Injury.—Death.*—A complaint for damages caused by a defective appliance (a derrick) by the administratrix of the deceased servant against the master, is sufficient where it shows that the master had full knowledge of the defect, and that the deceased servant was ignorant of the same.

MASTER AND SERVANT.—*Personal Injury* (*Death*) *of Servant.—Damages.—Defective Appliance.—Knowledge of.—Verdict, When Not Sustained by the Evidence.*—In an action for damages by the administratrix of a deceased servant whose death was caused by a defective appliance (a derrick), there can be no recovery where the evidence shows, beyond controversy, that the servant had an equal, if not a better, opportunity of knowing of the defect than the master.

From the Monroe Circuit Court.

F. M. Finch, J. A. Finch, J. H. Louden and *W. P. Rogers*, for appellant.

J. H. Jordan, J. R. East, O. Matthews and *J. Grimsley*, for appellee.

COFFEY, J.—This was an action by the appellee, in the Monroe circuit court, against the appellant, to recover damages on account of the death of Chris. Wolf, the husband of the appellee. Wolf was killed the 23d day of August, 1890, in the rock quarry of the appellant, in Monroe county, by the falling of a derrick. It is alleged in the complaint that the deceased, at the time of his death, was employed at the quarry in the capacity of an engineer; that appellant kept, and used at the quarry, a derrick which was wholly insufficient for the purposes for which it was used; that its timbers were weak and old; that in constructing, erecting and putting it in place for use, it was necessary in order to secure the top

attachments of the two knee braces, which were a necessary part of the machine, to have an iron key and fastening passing through the iron bolt, which was attached to the top of the mast to securely hold the braces in position, and thereby prevent the derrick from coming apart, breaking and falling when used in hoisting large stones, all of which was well known to the appellant at the time the same was erected, and, well knowing that fact, it negligently failed to put any key through said bolt; that the appellant knowing the weak and defective condition of the derrick, proceded to use the same on the 23d day of August, 1890, in hoisting large stone, by reason of which it broke and fell, killing the said Wolf without any negligence or fault on his part; that Wolf was ignorant of the defects in the derrick, while the appellant had full knowledge of the same.

A trial of the cause resulted in a verdict and judgment for the appellee, from which the appellant appeals to this court, and assigns as error:

First. That the circuit court erred in overruling the appellant's demurrer to the complaint.

Second. That the circuit court erred in overruling the appellant's motion for a new trial.

We think the complaint states a cause of action. The rule that the master is bound to use ordinary care in furnishing the servant a safe place to work, and safe machinery and appliances is too well settled and too well known to require the citation of authorities. This complaint shows a failure on the part of the appellant to discharge that duty, and alleges that Wolf, the deceased, was ignorant of the defective condition of the derrick which caused his death.

The court did not err in overruling a demurrer to this complaint.

It is contended by the appellee, that we can not consider the other error assigned, for the reason that the evidence in the cause is not properly in the record. We can not agree with the appellee in this contention. The longhand manuscript of the official reporter is embodied in a proper bill of exception, in exact compliance with the rule established in the case of *Wagoner* v. *Wilson*, 108 Ind. 210, and the cases following it. When the evidence comes to us in this form, we will not presume that the bill of exceptions was blank when signed by the judge, in the absence of some legitimate showing to the contrary. We think the evidence is properly in the record.

Many questions are presented on the second assignment of error; but as we have reached the conclusion that the verdict of the jury is not sustained by the evidence, we deem it unnecessary to consider any other question.

The facts in the case, as they are developed by the evidence, are that Wolf, the deceased, formerly owned the derrick, the breaking of which resulted in his death, using it in a quarry operated by himself. He sold it to the appellant, and the evidence tends to prove that he was entrusted with the duty of putting it up in the quarry owned by the appellant; at least it is proven and not denied that he assisted in putting it up. He was requested, by one of the employes of the appellant, to put in the key mentioned in the complaint, but replied that he would put that in some other day. Within a day or two after it was erected at the stone quarry of the appellant, in lifting a large stone, the derrick broke, and Wolf, from whom it was purchased, was crushed and killed.

Without the allegations in the complaint to the effect that the deceased was ignorant of the defects in the derrick, the falling of which resulted in his death, and that

the appellant had knowledge of such defects, the appellee could not have secured a lodgment in court. *Brazil Block Coal Co.* v. *Young*, 117 Ind. 520; *Rietman* v. *Stolte*, 120 Ind. 314; *Rogers* v. *Leyden*, 127 Ind. 50; *Lake Shore, etc., R. W. Co.* v. *Stupak*, 108 Ind. 1.

In order to succeed in the action, it was necessary to prove these allegations. The evidence proves, beyond controversy, that he had an equal, if not a better, opportunity of knowing the condition of the derrick than the appellant. Where the danger is equally known or open to both the master and the servant, there is no liability on the part of the master. *Vincennes, etc., Co.* v. *White*, 124 Ind. 376; *Swanson* v. *City of Lafayette*, 134 Ind. 625.

Judgment reversed, with directions to the circuit court to sustain the appellant's motion for a new trial.

Filed Sept. 20, 1894.

No. 14,712.

Robinson *v.* The State.

Verdict.—*Sufficiency of Evidence.*—*Supreme Court Practice.*—*Criminal Law.*—*Murder.*—*Weight of Evidence.*—Where, in a criminal action (for murder), the evidence is conflicting as to the guilt or innocence of the accused, the appellate tribunal will not pass upon the weight of the evidence.

From the Clark Circuit Court.

J. K. Marsh, for appellant.

A. G. Smith, Attorney-General, for State.

Hackney, C. J.—The appellant was convicted and sentenced to imprisonment for life upon a charge of

murder in the first degree, in the killing of Samuel T. Hay.

The only questions presented by the record arise upon the appellant's motion for a new trial, and the only discussion of counsel is as to the sufficiency of the evidence to support the verdict.

We have carefully read the evidence, and find that upon that of the appellee, if accepted as true, the charge was fully sustained, while that of the appellant, if standing alone and its truth not doubted, would support the defense of a justifiable homicide. Between the appellant and the family of the deceased there had been a long continued bitterness of feeling growing out of the appellant's effort to maintain a fence upon his farm which, as the Hay family insisted, interfered with their use of a private way over said farm. The fence had been frequently rebuilt and as frequently torn down, or its wires cut, the appellant's live stock straying from the place, and the cattle of others trespassing upon his fields. The parties had quarreled, had almost, if not quite, come to blows, and the appellant had carried, in a menacing manner, about his visits to and work upon the farm near the Hay farm, a pistol and a double-barreled shot gun, while the deceased procured a pistol, which he carried when anticipating a meeting with the appellant. The parties also involved each other in law suits, both civil and criminal. Finally the bitterness became so intense that on the occasion of the final meeting between the appellant and Samuel T. Hay, the appellant, over the protests of his daughter, took his gun from his wagon and fired at least seven buckshot into the breast of the deceased.

The evidence of the prosecution included threats on the part of the appellant to take Hay's life and an admission that he had taken it, not upon a sudden heat,

but after contemplating it for some time. The fatal shot was fired from the appellant's premises across a fence and struck the deceased while upon his own premises and was fired without words between the parties on that occasion.

The theory of the defense was that the appellant's weapons had been carried for and used in self-defense; that Hay had threatened to kill the appellant, had prepared himself to execute his threat, and that on the occasion of this final meeting, Hay was making an effort to get his pistol from his pocket when the appellant, to protect himself from imminent peril, fired the fatal shot. The case was hotly contested by able counsel, and the evidence involved contradictions and denials, from both sides, of most, if not all, of the important elements of each theory.

It will be seen, therefore, that the case was one peculiarly for the jury, as its decision rested upon the evidence and required that conflicts should be reconciled and the proper weight accorded to the testimony of the various witnesses.

We feel that to disturb the finding of the jury in this case would not only be to usurp the prerogative of the jury, but would be to ignore the precedents of this court observed from its organization.

The transcript in this case was filed January 4, 1889, and did not reach the judges upon distribution until September 18, 1894. Of this seeming unnecessary delay, we know nothing further than the statement of the attorney-general in his brief, that the delay in submitting the record to the court was by agreement of counsel on both sides.

The judgment of the circuit court is affirmed.

Filed Sept. 19, 1894.

No. 16,829.

SUIN ET AL. *v.* DESCHAMP ET AL.

PRACTICE.—*Action for Relief from Decree in Partition.—Demurrer, Effect of.—Right to Controvert the Facts Alleged.*—If a demurrer to a complaint seeking relief from a decree in partition be overruled, the effect of the demurrer in such case is that it admits the truth of the complaint only for the purpose of testing its sufficiency; and the defendant may thereafter controvert the truth of the facts alleged in the complaint.

From the Howard Circuit Court.

J. F. Morrison, *J. E. Holman*, *J. Cantwell* and *S. W. Cantwell*, for appellants.

D. A. Woods, *J. T. Elliott* and *W. C. Overton*, for appellees.

HACKNEY, C. J.—The appellants, as plaintiffs, sought to be relieved from a decree in partition, rendered by the lower court in a suit by the appellees. Their complaint was under section 396, R. S. 1881; section 399, R. S. 1894.

The court overruled appellees' demurrer to the complaint and granted them additional time in which to file counter affidavits, to the granting of which time the appellants excepted. Thereafter, and without objection or exception, counter affidavits were filed by the appellees; and rebuttal affidavits, by the appellants. Upon the affidavits so filed the court found for the appellees.

It is first urged by the appellants, that the appellees were precluded by the demurrer and the court's ruling thereon, and that it was error to admit counter affidavits and a further hearing.

The cases of *Nord* v. *Marty*, 56 Ind. 531, and *Clandy* v. *Caldwell, Admr.*, 106 Ind. 256, are cited as supporting this view.

In each of these cases the demurrer was sustained, and this court held that the demurrer admitted the facts pleaded and presented their sufficiency as upon an agreed statement of facts. The question suggested in the case before us was not in review in either of the cases cited, but the exact question has been repeatedly ruled against the appellants' view. *Lawler* v. *Couch*, 80 Ind. 369; *Nash* v. *Cars*, 92 Ind. 216; *Parker* v. *Indianapolis Nat'l Bank*, 1 Ind. App. 462.

We are asked to consider the evidence, and having found that there is stubborn conflict upon material questions, we decline to weigh and determine the preponderance. *Nash* v. *Cars*, *supra*; *Wells* v. *Bradley*, *etc.*, 3 Ind. App. 278.

In addition to the facts already suggested, as to the absence of exceptions to the introduction of affidavits, the affidavits in the transcript are not brought into the record by bill of exceptions, but of these questions we make no decision.

There is no error in the record, and the judgment of the circuit court is affirmed.

Filed Sept. 28, 1894.

No. 16,619.

Downey *v.* Head et al.

138	503
142	226
142	679
143	365
143	448
138	503
144	192

Bill of Exceptions.—*Reporter's Longhand Manuscript of Evidence.*—*When not in Record.*—Where what purports to be a stenographer's longhand manuscript of the evidence in the case is found with the record, but in no way attached to it, and the record shows no writ of *certiorari* prayed for or issued, by which it was brought up, and the manuscript is not certified to as "filed with the clerk of the court," nor as "incorporated in the bill of exceptions," and the clerk's certificate does not appear with the transcript for any purpose, the manuscript, and consequently the evidence, is not in the record.

Downey *v.* Head *et al.*

SUPREME COURT PRACTICE.—*Questions Depending on the Evidence.—Evidence not in Record.*—No question depending wholly on the evidence can be considered when the evidence is not in the record.

From the Lake Circuit Court.

C. F. Griffin, A. L. Jones, C. N. Morton and ——— *Wile*, for appellant.

W. A. Ketcham, for appellees.

HOWARD, J.—This was an action by the appellee Daniel Head against the appellant and others, to foreclose a mortgage on certain real estate in Lake county.

There was a finding by the court in favor of said appellee, followed by a decree and order of sale of said real estate.

The errors assigned on this appeal are:

1. That the cause was tried without a complaint filed.

2. That after demurrer sustained to the complaint originally filed, the appellee filed no amended complaint.

3. The overruling of the motion for a new trial.

As to the first two alleged errors, it is sufficient to say that it appears, from the return by the clerk of the Lake Circuit Court to a writ of *certiorari* issued out of this court, that an amended complaint was duly filed in the Lake Circuit Court. Upon this amended complaint the cause was tried and duly proceeded to judgment.

The only brief filed by appellant is a supersedeas brief, devoted in great part to a consideration of the first two assignments of error. In this brief it is said: "The time for filing a bill of exceptions in the case has not yet expired, and the same is now under consideration by the court, and will be duly brought up upon *certiorari* at a later date, when the same shall have been filed."

The record, however, shows no such writ of *certiorari* prayed for or issued.

In the same brief, and in relation to the third assign-

ment of error, counsel speak of "other errors occurring at the trial, which will be hereafter noted, when the bill of exceptions shall be duly certified up."

But the record shows no bill of exceptions "duly certified up," nor any certificate from the clerk of the Lake Circuit Court as to any bill of exceptions filed in his office. If a bill was filed, the transcript should show the fact under the seal and certificate of the clerk. Section 641, R. S. 1894 (section 629, R. S. 1881); *Loy* v. *Loy*, 90 Ind. 404; *Shulse* v. *McWilliams*, 104 Ind. 512; *Nofsinger* v. *Reynolds*, 52 Ind. 218; *Huff, Exr.*, v. *Krause, Admr.*, 63 Ind. 396; *Conkey* v. *Conder*, 137 Ind. 441.

We find with the record, but not in any way attached to it, a package of papers purporting to be a stenographer's longhand manuscript of the evidence in the case; but this manuscript is not certified to as "filed with the clerk of the court," nor as "incorporated in a bill of exceptions," as required by section 1476, R. S. 1894 (section 1410, R. S. 1881); nor does the clerk's certificate appear in connection with it for any purpose. It is, therefore, no part of the record. *Wagoner* v. *Wilson*, 108 Ind. 210.

The correctness of the court's ruling on the motion for a new trial depends wholly upon the evidence. The evidence, therefore, not being in the record no question arises under the third assignment of error.

From the files of the case it appears that, soon after the filing of their supersedeas brief, counsel for appellant, for cause not shown, withdrew their appearance and abandoned the appeal.

Judgment affirmed.

Filed Sept. 25, 1894.

No. 16,987.

138	506
143	339
138	506
d166	454
168	171

COREY, EXECUTOR, *v.* SPRINGER ET AL.

WILL.—*Construction of.*—*Real Estate.*—*Expectancy.*—*Conditional Fee.*—*Defeasible Interest.*—S. died testate in 1871, leaving his widow, a son and two daughters as his only heirs at law. The will provided as follows: "*Item third.*—It is my will, after the payments aforesaid are made, and after expenses of administration are all paid, that my wife, * * if she shall survive me, and remain my widow, shall have the use of all the remainder of my estate, both real and personal, during her lifetime, * * to be kept and used by her during * * her natural life, if she so long remain my widow; but in case of her marriage after my deceased, this provision of my will to be void, * * and, in that case, I desire that she take out of my estate, * * only such provision as the laws of the State of Indiana make for widows at the time of my death. *Item four.*—At the death of my wife, if she shall not marry again, I bequeath all my property, share and share alike, to my children * * *. In case my wife should again marry, and so take the provision herein made for her, * * I bequeath the remainder of my estate * * to my children, * * as provided in the former part of this will."

Held, that the children of S. took a conditional fee in expectancy, which was to ripen into an absolute fee at the death of the widow.

Held, also, that the son having died prior to the widow, who is still unmarried, his estate was a defeasible one, which was thereby defeated, and there remains no interest which can be subjected to the payment of the son's debts.

SAME.—*Distribution to Children at Death of Widow.*—Where there is an expressed or fairly implied intention to fix the time for distribution of the testator's estate to his children, "at the death of his widow," the law will uphold his purpose and intention.

From the Rush Circuit Court.

O. G. Miller, *W. A. Moore*, *J. M. Stevens*, *G. Sexton*, *J. E. Watson* and *T. J. Newkirk*, for appellant.

W. J. Henley and *L. D. Guffin*, for appellees.

DAILEY, J.—This action involves the construction of the last will of Gabriel Springer, deceased. Said Gabriel Springer died testate in 1871, leaving as his only heirs at law, his wife Hannah Springer, his son John J.

Springer, and his two daughters Nancy J. Miller and Sarah Bromlett. John J. Springer died testate in Rush county, Indiana, on December 25, 1891, leaving neither wife nor issue surviving him. Nancy J. Miller died, leaving Oscar Miller and Roy H. Miller, her only children and heirs at law surviving. Sarah Bromlet died, leaving her children, Perry F. Bromlett, Wesley F. Bromlett and Jesse T. Bromlett, defendants herein, surviving. The widow, Hannah Springer, still survives and since the testator's death has remained unmarried. The appellant, as executor of the last will of John J. Springer, deceased, filed his petition in the Rush Circuit Court, to sell certain real estate embraced in the will of Gabriel Springer, deceased, to pay the debts of the testator, John J. Springer, to which petition the appellees are parties defendant.

The defendants, Oscar Miller and Roy H. Miller, by their guardian *ad litem*, William J. Henley, and Perry F., Wesley F., and Jesse T. Bromlett, by their guardian *ad litem*, Lot D. Guffin, have filed their answers thereto, setting up the will of said Gabriel Springer. The controversy which arises upon demurrer to the answer is, what was the nature of the estate devised by said Gabriel's will to John J. Springer, appellant's testator? The items of the will which call for construction are the third and fourth. They are as follows:

"*Item third.* It is my will, after the payments aforesaid are made, and after the expenses of administration are all paid, that my wife, Hannah Springer, if she shall survive me, and remain my widow, shall have the use of all the remainder of my estate, both real and personal, during her lifetime, and I accordingly bequeath the same to her as aforesaid, to be kept and used by her during the time of her natural life, if she so long remain my widow; but in case of her marriage after my decease,

this provision of my will to be void, and to be of no effect, and in that case, I desire that she take out of my estate, real and personal, only such provision as the laws of the State of Indiana make for widows at the time of my death.

"*Item fourth.* At the death of my wife, if she shall not marry again, I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be. In case my wife should again marry, and so take the provision herein made for her, in that event, under the law of Indiana, I bequeath the remainder of my estate, real and personal, to my children, and to the representatives of such as may be dead, if any, as provided in the former part of this will."

As we understand the contention, appellant insists that by the terms of the will, the widow, Hannah Springer, took an estate for life in the lands in controversy, and that a remainder in fee vested in Gabriel Springer's children, of whom John J. Springer was one; and that such remainder in fee vested absolutely and unconditionally in said John at the time of his father's death. Appellees assume, upon the contrary, viewing the matter aside from the attempted limitation concerning, or with respect to marriage, that after carving out a life estate for his widow, it was the manifest intention of the testator, by the terms of his will, to give to his children living at her death, and to the descendants of such as were then dead, a vested remainder; that the testator appointed a fixed time when the conditional fee should ripen into an absolute fee in his children; a time when the division or distribution, as he styles it, should take place, and

that time was fixed at the death of the widow. As opposed to the theory that John J. Springer took an absolute, unalterable and unconditional fee at the time of the testator's death, it is maintained by the appellee that the remainder over to him at the time of the testator's death was only in the nature of a vested remainder; that it was alterable, conditional and limited, and that the time fixed by the testator himself for its ripening into a certain and absolute fee-simple was at the event of the widow's death. In our opinion the controversy in this case does not depend upon a solution of the question, whether the remainder to the son was a vested or a contingent one. It is not contended by the appellees that the remainder to him was contingent in the technical sense of the term. The test as to whether an estate is vested or contingent is this: "The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event; upon which the vacancy depends, must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determine whether or not the estate is vested or contingent." *Bruce* v. *Bissell*, 119 Ind. 525, on p. 530, citing *Croxall* v. *Shererd*, 5 Wall. 268; Tiedeman Real Prop., section 401. These authorities establish the doctrine that an estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. "It is the uncertainty of the right that renders an estate contingent, and not the uncertainty of the enjoyment." *Wood* v. *Robertson*, 113 Ind. 323, on p. 325. In the construction of wills, it is a familiar rule that the intention of the testator must prevail. *Wood* v. *Robertson*, *supra*, on p. 326. The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control.

Jackson v. *Hoover*, 26 Ind. 511; *Butler, Guar.*, v. *Moore, Exr.*, 94 Ind. 359; *Nading* v. *Elliott*, 137 Ind. 261.

Courts, in giving an interpretation to a will, may place themselves in the situation of the testator, examine the surroundings, and then, from the language used, arrive at his intention. *Jackson* v. *Hoover*, *supra*; *Price* v. *Price*, 89 Ind 90.

In the light of these rules it is proper to consider the language employed by the testator, and ascertain its force and significance. Aside from the provisions made in the event of the widow's marriage, the third item of the will devises an estate for life to his widow. The fourth item then reads: "At the death of my wife I bequeath all my property, share and share alike, to my children. If any of my children shall be dead at the time of such distribution or disposition, leaving children, such children are to take the share of their deceased father or mother, as the case may be."

Here the testator, in language clear and unmistakable as could be employed, fixes the time for "such distribution" or final disposition to occur, viz., "at the death of his widow." Until this event shall happen, he holds the fee conditional and in abeyance, subject to alteration, and only to ripen and fasten absolutely in his children surviving at the death of his unmarried widow. Appellant's counsel state the rule correctly, that "the law favors vested estates, and remainders will never be held to be contingent when they can consistently, with the intention of the testator, be held to be vested. Words of survivorship, generally, in the absence of an expressed or implied intention to the contrary, are construed to refer to the testator's death. *Boling* v. *Miller*, 133 Ind. 602; *Davidson* v. *Bates*, 111 Ind. 391; *Harris* v. *Carpenter*, 109 Ind. 540; *Davidson* v. *Koehler*, 76 Ind. 398; *Bruce* v. *Bissell*, *supra*.

But the converse is true, that where there is an expressed or fairly implied intention to the contrary, the law will carry into effect the evident purpose of the testator. And where the testator fixes the time, by expressed or fairly implied intention, for the distribution of his estate to his children, at the death of his widow, the law will uphold his purpose and intention. *Wood* v. *Robertson, supra.*

A conditional fee may be created by will as well as by a deed. It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. *Shimer* v. *Mann*, 99 Ind. 190 (198).

It is evident, in this case, that John J. Springer, by the terms of the will, took a conditional fee; that his estate in expectancy was to enlarge and ripen into an absolute fee at the death of the widow; that he having died prior to that event his estate was a defeasible one, which has been defeated, and there remains no interest which the appellant, as executor, can seize upon or sell by the order of the court to pay his debts. A will ought to be so construed as to give effect to all its provisions, and make it a harmonious whole. *Jackson* v. *Hoover, supra; Cooper* v. *Hayes*, 96 Ind. 386; *Wood* v. *Robertson, supra*, on p. 326; *Nading* v. *Elliott, supra; Brumfield* v. *Drook*, 101 Ind. 190.

In this controversy between the parties, it is the contention of the appellant's counsel, in their reply brief, that the will must stand as if there was no provision with reference to the widow; that those provisions are in restraint of marriage, and void under section 2567, R. S. 1881; Burns Rev. 1894, section 2737.

As the widow, Hannah Springer, is still living and unmarried, and John J. Springer departed this life with-

out issue, no question is presented for our consideration as to whether the devise and bequest contained in the will concerning the widow's interest, if she should marry, are limitations of the estate merely, or conditions in restraint of marriage within the meaning of the statute. If the question were before us it would be easy of solution. In 4 Kent's Com., 126, the distinction is defined between words of limitation and words of condition, as follows: "Words of *limitation* mark the period which is to determine the estate; but words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate." We find no error in the record.

The judgment is affirmed.

Filed April 25, 1894; petition for a rehearing overruled Sept. 21, '94.

138 512
156 118
156 121
156 131
156 132
156 142
156 151
156 153

No. 17,173.

The City of South Bend et al. *v.* Lewis.

Election.—*For Adoption of Proposed Measure.—Majority.—Failure to Vote.—Acquiescence.*—Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.

Same.—*When Majority of all Votes Required.—Regular Election.*—Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at "such election," a majority of all the votes cast at the election is meant,

and not merely a majority of the votes cast on that particular question.

SAME.—*When Less than a Majority of all Votes Sufficient.*—Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary.

SAME.—*Votes Upon Particular Proposition.—What Required.*—Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that a "majority of the votes given" shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved.

SAME.—*Union of City and Town.—Election Upon.—Vote Required.—Statute Construed.*—The act of February 16, 1857, for the union of cities and towns, being sections 3233 *et seq.*, R. S. 1881, requiring the votes of a majority of the qualified voters of each corporation, at a special election held on a day to be fixed by the city and town authorities for the purpose of determining the matter, the result of which is to be specially canvassed and declared, only contemplates a majority of the persons voting upon the proposition for union, and the fact that the day fixed for the election is the day upon which the general municipal election is required by law to be held, and that the votes cast in favor of such proposition do not constitute a majority of the votes cast for municipal officers, does not affect the result.

From the St. Joseph Circuit Court.

J. G. Orr and *A. Anderson*, for appellants.

L. Hubbard, for appellee.

DAILEY, J.—This was an action for injunction brought by Mary C. Lewis, appellee, against the City of South Bend and the Town of Myler et al., in order to contest the validity of proceedings for the annexation of the Town of Myler to the City of South Bend. It is claimed by the appellee that the proceedings for annexation are defective in this, that the proposition to annex the Town of Myler to the

City of South Bend was not voted for by a requisite majority of the voters of the City of South Bend. The facts were found specially by the judge of the circuit court, and the only error assigned is that the court erred in its conclusions of law.

The questions involved in this case have arisen under the act of February 16, 1857, for the union of cities and towns, being sections 3233 to 3242, Revised Statutes of 1881.

Section 1, of said act, provides that where an incorporated town and incorporated city adjoin each other they may be consolidated or united, provided a "majority of the qualified voters of the town and a majority of the qualified voters of the city shall vote in favor thereof, at elections to be held as hereinafter provided."

Section 2 provides for an agreement between the common council of the city and the trustees of the town as to the terms and conditions of the union, etc., and as to the day upon which "an election shall be held for the people of such town and city to vote upon the question" of such union, etc.

Section 3 provides for the publishing of said agreement for three weeks before "such election," etc.

Section 4 provides that "the election above provided for" shall be held at the time agreed on, at the same place where elections are usually held, and shall be governed by the same laws, etc.

Section 5 prescribes the form of ballots to be used, requiring those who vote in favor of the proposition to have the word "Union" on their tickets; those against, the words "No Union," etc.

Section 6 is as follows: "The inspectors and judges of the election shall report to the common council, and president and trustees, respectively, the result of such election. And the report of the inspectors and judges

of the town election shall be entered on the records of the president and trustees, and a certified copy thereof delivered to the clerk of the city; and the report of the inspectors and judges of the city election shall be entered on the records of the common council, and a certified copy thereof delivered to the clerk of the town. And if a majority of the votes given in the town as well as a majority of the votes given in the city are in favor of union or annexation, then the president and trustees and the common council shall meet at the council chamber of the city council, and, by resolution, declare that the town is annexed to the city, or the two united, as the case may be, according to the agreement aforesaid. And such resolution shall be entered on the records of the city council, and such record, and certified copies thereof, shall be conclusive evidence of such union or annexation, and a copy of such resolution shall also be recorded in the recorder's office of the county where such city is situated, and copies of such record shall be good evidence in all courts."

The facts in this case are set forth in the special findings, and are briefly as follows: The town of Myler was a suburb of the City of South Bend, and on the 31st day of March, 1892, the common council of the city of South Bend and the president and board of trustees of the Town of Myler agreed upon the terms of union of said town to said city. The day agreed upon for an election was May 3, 1892, the day of the general city election in said city. The preliminary steps were all taken, and the law was fully complied with.

At the election held on May 3d in the city, 1,750 votes were cast in favor of the said proposition, and 237 votes were cast against the same. In the town 39 votes were cast in favor of the proposition, and 6 votes against it.

The total number of votes cast for candidates at the city election was over 5,000.

On the 9th day of May, 1892, at a joint meeting of the trustees of the said Town of Myler, and the common council of the said city, in the council chamber of the said City of South Bend, a resolution was adopted declaring that the Town of Myler had been annexed to the City of South Bend.

On the 7th day of December, 1892, the appellee filed her complaint in the St. Joseph Circuit Court on behalf of herself and all of the other property owners in the Town of Myler, to declare said annexation proceedings void, and to enjoin the collection of city taxes. The only question presented in this case is, whether the proposition for annexation requires a majority of the votes cast for and against the particular proposition, or whether it requires an affirmative vote of a majority of all persons who voted for candidates at the city election held at the same time.

It is now well settled, both in England and in this country, that when an election is to be held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those who absent themselves from such election or those who, though present, abstain from voting, are considered as acquiescing in the result declared by those who do vote, even though those voting may constitute a minority of those entitled to vote. McCrary Elections, section 173. *People, ex rel.*, v. *Warfield*, 20 Ill. 160; *Gillespie* v. *Palmer*, 20 Wis. 572; *Louisville, etc., R. R. Co.* v. *County Court of Davidson*, 1 Sneed 637 (692); Angell & Ames Corp. (9th ed.), sections 499-500; *St. Joseph Tp.* v. *Rogers*, 16 Wall. 644; *County of Cass* v. *Johnston*, 95 U. S. 360 (369); *Board of Supervisors Carroll County* v. *Smith*, 4 Sup. Ct. Reporter, 539.

A careful examination of the cases will show that in every case the decision rests upon the construction placed upon the statutes under which the election is held. The statutes of the several States are different on the subject of elections. In some States the statutes require a "majority of the votes;" others "a majority of the voters voting," etc.

The case of the *Board of Supervisors Carroll County* v. *Smith*, *supra*, arose upon the construction to be placed on the words "two-thirds of the voters," in the constitution of Mississippi. The act referred to required the question of subscription or no subscription, to be submitted to the decision of the qualified voters of the county, city, or town, and if "two-thirds of the qualified voters" be in favor of the subscription the authorities are authorized to subscribe, etc. There were, on the day of election, 3,129 registered voters in the county, but only 1,280 of the voters voted at the election, of whom 918 voted in favor, and 362 against the proposition. The court said, on page 544: "The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present, and voting at such election in its favor, as determined by the official return of the result. The words 'qualified voters' as used in the constitution must be taken * not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote."

When a question or an election is put to the people, and is made to depend upon the vote of a majority, there can be no other test of the number entitled to vote but the ballot. If, in fact, there be some or many who do

not attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence. Certainly it would be competent for the legislators to prescribe a different rule; but when they simply refer a question to the decision of a majority of the "voters of a county," it can not be understood that they mean anything more than those who see fit to exercise the privilege. *Louisville, etc., R. R. Co.* v. *County Court of Davidson, supra*, 1 Sneed 637, 62 Am. Dec. 424 (452).

In *Southworth* v. *Palmyra, etc., R. R. Co.*, 2 Mich. 287, it is held that where a constitution requires that acts of incorporation shall have "the assent of at least two-thirds of each house," the word "house" means members present doing business—those forming a quorum—and not a majority of all the members elected.

In *St. Joseph Tp.* v. *Rogers, supra*, a statute of Illinois, by its 12th section, authorized any township along the line of a railroad named to subscribe to its stock.

But it was provided in the 13th section of the same act that no subscription should be made until notice had been given to the legal voters to meet for the purpose of voting on the matter: *Provided*, that where elections have already been held, and a majority of the legal voters of any township were in favor of a subscription, no further election should be necessary.

At an election held before the passage of this act, in St. Joseph township, only seventy-five persons voted, while in fact there were three hundred legal voters in that township.

Held, that a majority of those voting was sufficient to authorize a subscription, although all of the voters voting on both sides were together but a minority of the legal voters of the township.

It is equally well settled that where a question is required to be submitted at a general election, and a "majority of the voters" at "such election" is required to adopt the measure, that a majority of those voting at the election is required, and not merely a majority of those voting on the proposition. McCrary Elections, section 552; *State, ex rel.*, v. *County Com'rs*, 6 Neb. 474; *People* v. *Brown*, 11 Ill. 478; *Enyart* v. *Trustees, etc.*, 25 Ohio St. 618; *Everett* v. *Smith*, 52 Minn. 53; *Bayard* v. *Klinge*, 16 Minn. 249.

The rule is clearly and forcibly stated by Chief Justice Ripley in the latter case. He says: "Hence considering that the constitution requires such law to be submitted to the electors at a general election, that the returns would show the actual number of persons present at such elections voting on any question; that as a general rule it is the duty of every elector to attend and vote at such general election, and that the law presumes that every citizen does his duty;" they (the court) hold that in the eye of the law those present and voting at such election, not on any question then submitted, but on any question then to be voted on, constitute the electors of the county in the sense in which article 2, section 18, of the constitution uses such words; that is to say, that body, the adoption by a majority of whom, of such law as is referred to, would be the adoption thereof by a majority of the electors of the county.

In *Enyart* v. *Trustees, etc.*, *supra*, a question was required to be determined by a "majority of the electors of the said township, at some regular election." The question was submitted at the presidential election. Held, that it required a majority of the votes cast for President and Vice-President.

In *People* v. *Brown*, *supra*, the constitution declared that the General Assembly may provide for township

organization whenever a "majority of the voters of such county, at any general election," shall so determine.

The Legislature passed such a law, but the fourth section of the act provided that if it appears by the returns of said election that a majority of all votes cast for or against township organization should be in favor thereof, then such county should be subject to and be governed by the act. At the general election there were over six hundred votes cast, of which one hundred and fifty-three were in favor of, and one hundred and seven against, the proposition. It was held that the constitution required a majority of all votes cast at the general election, and that section 4 of the act was repugnant to the constitution and could not stand.

It appears from an examination of these cases, that when an act of the legislative body provides that the votes of a majority of the voters of any subordinate corporation shall be requisite to the adoption of any measure, then the only question is, did the measure receive a majority of the votes of the electors voting on the proposed measure; but when the act requires that the question shall be voted on at some general election and receive a majority of the votes cast at such election, then it must be voted for by a majority of all the electors taking part in such general election.

In the case under consideration there was no requirement that the question of annexation should be submitted at a general election, but it was left to the officers of the city and town to determine when the election shall be held. The forms of ballots to be used are prescribed and provision made for casting and counting the votes cast on the question of annexation alone. No votes, except those upon the subject, are mentioned or contemplated in the act, and the only election named is the one

which is to be agreed upon between the city and town authorities.

This appeal presents but one question for our consideration: Must a majority of the voters of both the city and the town vote in favor of annexation before it can be consummated, or is a majority of those in each place voting directly upon the proposition only required?

Section 3233, R. S. 1881 (Burns' Rev., 1894, section 4208), provides that: "Where an incorporated town and an incorporated city adjoin each other, they may be consolidated or united, or the town annexed to the city, provided a majority of the qualified voters of the town and a majority of the qualified voters of the city shall vote in favor thereof, at elections to be held as hereinafter provided."

Section 3238, R. S. 1881 (Burns' Rev., 1894, section 4213), provides that the inspectors and judges of each election shall report the "result of such election, * * and if a majority of the votes given in the town, as well as a majority of the votes given in the city, are in favor of the union or annexation," the authorities of the two corporations shall meet, and, by resolution, declare them annexed. The word "given" obviously refers to votes given on the question of annexation. It is very clear that there was no other election contemplated by the Legislature. The question was one which affected only the people in the particular vicinity, and fixing the day for the election is left to the convenience of the people therein.

In *State, ex rel.*, v. *Babcock*, 22 N.W. Rep. 372, the question there involved was required to be submitted at the election of Senators and Representatives, and required a majority of the votes cast at such election to adopt it. The court held that the words "such election" referred to the election for Senators and Representatives. The

words "such election" in the statute under consideration just as plainly refer to the election spoken of in the preceding sections, viz.: The annexation of the town of Myler. The question then arises: Will the fact that the authorities of the districts affected saw proper to submit the subject to the voters on the day of a municipal election change the result of the election and have the effect of counting against the proposition the votes of those who attended and voted at the regular election, but who failed to vote on the question submitted at the special election? The intention of the Legislature is to be gathered from the language of the act, and every case necessarily involves and turns upon the construction of statute law.

In the case of *Board, etc.*, v. *Winkley*, 29 Kan. 36. where a proposition to allow a bounty for the growing and cultivation of hedges, was submitted to the voters under a statute, which provided that "If a majority of the votes cast are for the bounty they shall declare said law to be in full force and effect." The proposition was voted on the same day on which the general election for township officers was held, and did not receive a majority of the votes cast at the township election, although it did receive a majority of the votes cast for and against it. Counsel, therefore, contended that the proposition was defeated. It was held, however, that the electors who were present at the polls, at the called election, and while voting for township officers, did not vote upon the bounty proposition, were presumed to assent to the expressed will of the majority of those voting thereon.

In *State, ex rel.*, v. *Echols* (Kan.), 20 Pac. Rep. 523, an election was held to determine whether a county high school should be established, and the question was submitted at the general election of that year for county officers. It was found that 2,264 votes were cast upon the

proposition; 1,397 in favor of, and 867 against it, while there were 3,109 votes cast for county officers. The statute under which the election was held required the question to be submitted to the voters of the county at a general or special election, and provided that after the election the ballots on such question should be canvassed in the same manner as those for county officers, and if a majority of all the votes cast shall be in favor of establishing such school the county commissioners are required to provide therefor. It was held that a majority of the votes cast on the proposition was required.

In *Armour Bros., etc., Co.* v. *Board, etc.*, 41 Fed. Rep. 321, an election was held under the laws of Kansas, relating to the purchase of land for a poor farm, providing that the board of county commissioners shall have power to assess a tax, not exceeding $500, unless the amount of taxes to be assessed shall be submitted to a vote of the people at some general election, and the majority of all the votes cast at a poll opened for that purpose shall be in favor of such assessment. It was held sufficient if the proposition received a majority of all the votes cast on that particular question; that it was not necessary that it should receive a majority of all the votes cast at the election. The court further said that if, instead of saying "at a poll opened for that purpose" the words "at said election," had been used after the word "cast," it would have fairly expressed the meaning contended for by the defendant.

In *State, ex rel.*, v. *Barnes*, 55 N. W. Rep. 883, it appears that Congress, by an act approved February 22, 1889, known as the "Enabling Act," directed the people in what is now North Dakota, to elect delegates to a convention to formulate a constitution to be submitted to the qualified electors for their adoption, and provided for the submission, at the same time, of separate articles or ord-

inances, and required for their adoption a "majority of the legal votes cast." Article 20 of the constitution, known as the "Prohibition Article," was so submitted. The time and manner of electing State officers was left entirely to the convention. The convention provided for the election of all State officers at the time of the vote upon the adoption of the constitution. Article 20 received a majority of the votes cast upon the question of its adoption, but did not receive a majority of the votes cast for Governor. It was contended, therefore, that article 20 did not receive a majority of the "votes cast," but the court held that when Congress had spoken of "the votes cast," it had reference to those cast upon the particular objects which it had directed to be submitted to a vote of the qualified electors. Congress had no knowledge that any candidates for offices would be voted for at such election, and the manner of their election was left under the exclusive control of the constitutional convention. And, further, it was the vote upon the constitution and the articles, if any, separately submitted which was to be certified to the President. And if, by use of the words "majority of the votes cast," Congress meant votes cast upon any subject, other than those directed to be certified to the President, it would be impossible for that official ever to ascertain whether a constitution had been legally adopted, although, under the the act, the duty devolved upon him to determine that question at once.

In *Walker* v. *Oswald*, 11 Atl. Rep. (Md.) 711, section 7 of the act relating to the adoption of high license, provided that "the voters of said county, at the general election, shall determine, by ballot, whether the provision of this act shall go into effect in said county. Those favoring the act will cast their ballots with the words printed or written thereon, 'for high license law;' and

those opposing the act shall cast their ballots with the words printed or written thereon, 'against the high license law;' and it shall be the duty of the judges of said election to make a full return of the ballots cast as aforesaid *, to the clerk * *, who, 'from the certified return shall immediately make proclamation as to the result of said election.' ''

Section 8 provides that the act shall take effect "if the majority of the voters of said county shall determine, by their ballots, in favor of the high license law."

At the general election, the aggregate number of votes cast for the several candidates for Congress was 8,680. The number of votes cast "for the high license law" was 4,314, and the number "against the high license law" was 3,825. The clerk issued his proclamation declaring the result in favor of "high license law."

A saloon keeper applied for a license under the old law, and the clerk refused to grant it, unless the applicant should comply with the provisions of the "high license laws." He therefore filed his complaint asking for a writ of mandamus compelling the clerk to issue a license. The only question presented in the appeal, as stated by the judge who decided the case, is, "did the adoption of the act depend upon its receiving in its favor a majority of the votes cast at that election upon some other subject or subjects? or upon its receiving a majority of the votes cast specifically for or against adoption?"

And, further, the court said: "This objection to the adoption of the act is founded exclusively upon the construction which is sought to be placed upon the words of the eighth section, 'a majority of the voters of said county,' taken in connection with the evidence furnished by the vote in the congressional canvass, that there were more voters in the county than the number who voted upon this measure."

This brings up the exact question presented in this case. The only points of difference between this statute and ours is this: That in the Maryland statute the question was required to be submitted at the general election, but the judges of election were to make a full return of the ballot "cast as aforesaid." In our statute, no requirement exists for submitting thequestion at a general election, but the result must be declared from the "votes given." This makes the effect of these statutes the same on this point.

"In regard to a general election," says the court, "it is urged that the highest aggregate vote cast furnishes the evidence as to the number of the voters of the county. At a special election it is not improbable that only a minority of the voters, well known to be an unmistakable minority, may vote. This fact might be susceptible of proof,—might be in reality self-evident. Yet, in the latter instance, those who absent themselves from the polls, and those who, being present, abstain from voting, are regarded as assenting to the result declared by those who do vote. Upon what principle would it be incompetent to apply the same presumption to those who, though attending a general election and voting on other subjects, abstain from voting upon one particular matter like the act in question? The very concession that a minority may elect necessarily implies that there is a large number of voters who do not vote, of whom that minority is merely a fraction. Hence the admission that a majority of those entitled to vote did not vote, does not preclude the minority who actually do vote from determining the results by their ballots. * * *

"Recurring to the language of the act, it will be observed that the Legislature has with particularity provided the forms of the ballots, both for and against the high license law; and that it has prescribed that 'a full return of the

ballots cast as aforesaid,' that is cast for and against the act should be made by the judges of election to the clerk, and that the latter, 'upon the certified returns, shall immediately make a proclamation of the result of said election.' What possible reason was there for the Legislature making provision with such exactness for "a full return of the ballots cast,' both for and against the high license law, and for a proclamation by the clerk upon the certified returns, if it were not designed that exclusive reference to the votes cast on that subject should be had in determining whether the act did or did not become operative? It is perfectly manifest that the phrase, 'full returns of the ballots cast as aforesaid,' refers to the votes cast for and against the high license law, and to no other votes; and that the duty of the clerk to 'make proclamation as to the result of said election,' could only be performed by announcing the result as evidenced by the certified returns of the votes cast upon that subject. If, therefore, he was confined, in making his proclamation as to the result of the election, to the returns made to him of the votes cast for and against the adoption of this act, no votes cast at the same election for some other purpose can be considered, counted or resorted to in determining the question of the approval of this measure. Indeed, if the Legislature intended that the act should not become effective, unless the majority of all the voters of the county affirmatively voted for it, it is difficult to conjecture a reason for the insertion of the provision respecting the casting and counting of votes against the measure, because, upon the assumption that the construction contended for is correct, if the votes cast in favor of the act had not been equal to the majority of all the voters voting for some candidate or for some other measure at that election, the act would have failed to take effect, notwithstanding no votes

had been cast against it at all; and consequently it would have been wholly unnecessary to make any provision whatever for casting ballots against the adoption of the law. The proclamation which the clerk is directed to make is 'as to the result of said election;' that is, the election held upon this question. The eighth section of the act must be read in conjunction with the seventh section, which we have been considering, and, thus read, clearly means, not a majority of all the voters of the county voting upon some other subject, but a majority of all the voters of the county who vote upon this act. The contrary construction would place these two sections in antagonism, and would cause the eighth to render nugatory the provision of the seventh section."

The case of *People, ex rel.*, v. *Wiant*, 48 Ill. 263, is distinguishable from the case at bar. It was an application for a mandamus to compel the county treasurer to remove his office to the town of Wheaton, which, it is averred, had been recently selected as the county seat of DuPage county. The act under which the election was held provided that if it should appear upon a canvass of the votes that "a majority of the legal voters of the county had voted for removal to Wheaton, then that place should be the county seat." The election returns showed that more votes were cast for the election of a circuit judge than upon the question of the removal of the county seat, and while a majority cast upon the question of county seat removal was in favor thereof, yet there was not a majority of the entire votes cast, and the mandamus was refused.

There are two important points of difference between the Wiant case and the one presented by this appeal. In the former the certificate of the clerk as to the result of the election is not made conclusive, while in the latter, by the R. S. 1881, section 3238, Burns' Rev. 1894, sec-

tion 4213, the record of the resolution declaring the town and city united, it is declared, "shall be conclusive evidence of such union or annexation." In the former it is expressly provided that the result must show a "majority of the votes of the county" in favor of the measure. In this case the statute provides that the result of "such election" shall be declared from the votes given, and the only election contemplated is the one to determine the particular question. It seems that the learned judge in the court below considered the decision in *State* v. *Swift*, 69 Ind. 505, as decisive of this case. The question there involved related to the adoption or rejection of a certain constitutional amendment that had been submitted to the people for their approval. Particular stress is laid upon the importance of restricting the right to change the organic law. The court say on page 519: "The ratification of a constitutional amendment affects the rights of millions of people who are not electors and can not vote, and for an indefinite time, until the amendment shall be abrogated by the same power that made it. In such case the constitution requires a majority of all the electors to ratify the amendment. The principle of plurality, which might ratify a constitutional amendment, irrepealable by legislative action, binding the rights of two millions of people, for an indefinite period, by vote of two electors against the vote of one, when the whole number of votes cast were but three, is not only unconstitutional, but it is dangerous to human rights, and repugnant to the sense of mankind. As the adoption of a constitution is the considerate act of an entire people, and as it binds all departments of the government, and can not be repealed except by the same power that made it, its adoption should not be left to the vicissitudes of a meager plurality of votes, which the

accidents of a day might cast one way or the other." The court declares there is no analogy between cases cited by the appellee, wherein taxes are assessed on franchises granted by a majority of electors, and the ratification of a constitutional amendment; as the former affects the rights of but few persons relative to the whole number of the people, while the ratification of such amendment affects the entire body. On page 523, they say there are very few cases, involving the ratification of constitutional amendments, and that they "must therefore rely upon the precedents and practices found in the history of our own State." From a careful examination of the opinion, it seems the court did not consider the rule applicable in cases like the one now under consideration, and relied wholly upon the construction placed upon various sections and amendments of sections of the constitution of this State as shown by the debates, and the importance of restricting constitutional amendments. In the *State, ex rel.*, v. *Babcock, supra*, the question there raised was as to the number of votes necessary to adopt an amendment to the constitution. It is there said: "Section 1, article 15, of the constitution, provides: Either branch of the Legislature may propose amendments to the constitution, and if the same be agreed [to] by three-fifths of the number elected to each house, such proposed amendment shall be entered on the journal, with the yeas and nays, and published once a week in at least one newspaper in each county where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection; and if a majority of the electors voting at such election adopts such amendments, the same shall become a part of the constitution * * *;" and it is further said substantially:

At the election 134,000 votes were cast for governor, 132,000 for senators and representatives, 51,959 in favor of the proposed amendment, and 17,786 against it. It was held that the section required the majority of votes cast for senators and representatives. The decision rested on the construction to be given the constitutional provision under which it was held. It will be observed that the section quoted required the proposition to be submitted to voters at the election of senators and representatives, and provided "if a majority of the voters at such election adopts such amendment, the same shall become a part of the constitution." The words "voting at such election" clearly meant those voting at the election of senators and representatives, and the court said: "Those words were evidently intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the State to incorporate new provisions therein."

It is further said, on page 375, that "The convention that framed the constitution doubtless presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption; hence, before an amendment can be submitted to the people, at least three-fifths of the members elected to each house must agree to the proposed amendment. It must then be submitted to the electors, * * and the submission must be at the election when Senators and Representatives are elected, and the majority of those voting at such election are required to vote in favor of the proposition to adopt the same. The words 'such election' evidently refers to the election for Senators and Representatives."

In the opinion the court criticised the case of *State* v. *Swift*, *supra*, 69 Ind. 505, involving the same principle, stating that the election at which the proposed amendment was to be submitted was the township election, and the

question of amendment was the only one requiring a State canvass of the votes. And it would seem that the only criterion by which the vote of the State could be ascertained was the vote upon that question. It is also said the rule of construction, as applied to statutes and constitutions, is to "compare and consider the several parts of the section and to deduce therefrom the purpose and intent of the law givers. And, "in the absence of a statute or constitutional provision requiring a majority of all the votes cast to be in favor of a proposition, there is no doubt that a majority voting upon that question may be considered as tacit assent to the will of the majority voting thereon."

Applying such a rule of construction to the case of *State* v. *Swift*, *supra*, it would be difficult to reconcile it with the Nebraska case. It is, at least, evident to our minds that the rule declared by the court in *State* v. *Swift*, *supra*, should not be extended so as to embrace any litigation other than that arising on the question of amending the organic law of the State. From an examination of the authorities bearing upon the question, we deduce the following rule: If, from the language of the statute, it is intended that a special vote shall be cast upon a proposition, and the law does not expressly require the majority of the votes cast at the general or regular election to adopt the measure, then it matters not whether the votes are cast at the same poll as is used for the election of officers. All that is necessary, in such case, is that the measure should receive a majority of the votes cast for or against it, and they can be separated from the rest of the votes cast at such election and the result declared from the votes cast on the proposition. In the case of an election for officers, it frequently happens that a candidate for one office receives more votes than an aspirant for another office voted for on the same

ticket. In such case each candidate is only required to receive a plurality or majority of the votes cast for his particular office, and those cast for a candidate for another office are not considered in determining such plurality or majority. There can be no reason for a different rule of construction when a proposition is submitted at the same time. A voter goes to the polls and examines his ticket concerning everybody and everything to be voted for; weighs the capabilities of the several candidates and the merits pro and con of the proposition, and then casts his ballot, voting separately for each candidate and on the proposition, according to his own judgment. There is no reason why the highest number of votes cast for an office should be taken as the criterion when determining the result of a vote on a proposition any more than for the election of an officer. It is manifest, if such a rule were to apply to candidates in many cases, neither would receive a majority of the total number of votes cast and there would be no election. As a result of applying such a rule, a proposed measure might be defeated, while the same number of votes cast in its favor would have secured the election of an officer. The nature of the proposition might be such that it should not be passed thoughtlessly by, or left to the will of a few of the voters who should choose to vote upon the same at a regular election. In such cases the Legislature could throw a safeguard around the measure by requiring it to be submitted at a regular election which would presumably call out all the electors, and by requiring it to receive a majority of all the "votes cast at such regular election." In the absence of such requirement provided by the Legislature, there is neither principle nor authority for measuring the result by any other votes than those cast for or against it.

The learned counsel for the appellee seems to rely

upon the provision that a town and city may be united if a "majority of the qualified voters of the town and a majority of the qualified voters of the city" vote in favor thereof. If this section stood alone, it might be urged that a majority of all the voters are necessary, and the number of votes cast at the city election for officers should be taken as additional means for ascertaining the number of legal voters of the city. But the other sections of the act clearly show that such was not the intent of the framers of the act.

In the first place, section 1 limits the number of qualified voters to those voting "at an election to be held as hereafter provided."

Section 2 provides that the respective officers of the city and town shall agree upon the terms of such union or annexation "and also upon a day when an election shall be held for the people of such town and city to vote upon the question of union, consolidation or annexation, etc."

Section 3 provides that said agreement shall be published at least three weeks before the time agreed upon for "such election."

Section 4 provides that "the election above provided for" shall be held, etc.

Section 5 provides that those who vote in favor of union or annexation shall have on their tickets the word "Union," and those who vote against it shall have on their tickets the words "No Union."

Section 6 provides that the inspectors and judges of election in the town and city respectively shall report the result of "such election," which reports shall be entered on their respective records, and certified copies of these records mutually exchanged. Then the officers of the city and town meet, and if "a majority of the votes given" in the city and in the town are in favor of a union

or annexation, they shall by resolution declare them annexed, etc. This resolution shall be recorded, and such record shall be conclusive evidence of such union or annexation, etc.

Reading all these sections together, we are unable to think otherwise than that but one election was contemplated by the Legislature, and that the only votes to be counted or considered were those cast for or against the proposition. Sections 1 and 6 show that so far as that proposition was concerned the "voters of the city" were those who chose to cast their votes on it. By section 6 only the result of "such election" was to be reported. Not by any possible construction could it be said that the inspectors and judges were to return to the common council and board of trustees the votes cast upon other subjects or for candidates for office. They were to return the votes cast at "such election," which is described in section 2 as "an election held for the people of such town and city to vote upon the question of such union or annexation." From this report, then, must the common council and board of trustees determine the result of the election. The result, then, would depend entirely on the votes cast for and against the measure, and those voters who, for any reason, did not vote on the question at all would be bound by the result. They would be estopped from saying that the result was not the will of the majority. In order to make the matter plain and effectually prevent such voters from disputing the result, the Legislature has gone further, and expressly declared that the record of the resolution, based upon the "votes given" at "such election," shall be conclusive evidence of such annexation.

The result of the construction claimed by appellee would be to count against the measure all votes cast for city officers, which were not directed to this measure,

making it within the power of citizens to defeat the measure by simply ignoring it.

If such a construction is correct, there would be no necessity for providing, as the Legislature did, that when the question was submitted to a vote, votes should be cast for "no union;" for if the votes in favor of the union were not equal to a majority of all the votes cast for municipal officers, then the proposed union would be defeated. Why should the Legislature provide for a count of the votes against the union when, under the proposed construction, the result could be arrived at by simply ascertaining whether more than half of all the votes cast were in favor of it? It seems to us that this provision alone settles the question, and shows that the Legislature must have intended, in passing the act under consideration, that the votes in favor of the union should be first counted and then the votes against the union should be counted, and that the only question for the inspectors of the election to determine was whether the votes in favor exceeded the number of votes against the proposed measure.

From what we have said, we think it clearly appears that four leading principles may be considered as fully established, namely:

First. Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.

Second. Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at "such election," a majority of all the votes cast at the election is meant, and

not merely a majority of the votes cast on that particular question.

Third. Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary.

Fourth. Where a legislative body provides that a proposition shall be submitted to the voters; that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that a "majority of the votes given" shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved.

Of the correctness of these four principles we think there can be no dispute. The only doubts which can arise are those occasioned by a confusion of the second and third. Indeed it may be said that the first and third principles are identical, and control all such cases except such as are controlled by statute or constitutional law.

Thus, in *Oldknow* v. *Wainwright*, 2 Burrow, 1017, the rule was announced that those who absented themselves from the election were bound by the result declared by those actually voting. But that case went further, and declared that the same rule applied to those who were actually present and abstained from voting. The facts showed that nine voters voted, and also that eleven voters were present and failed to vote. Counsel for appellee contended that the votes cast at the regular election merely enabled us to ascertain the actual number of voters in the county, and are merely a matter of evidence. The court said:

What difference could it have made whether the eleven voters who did not vote were there protesting against an election, or were there for the purpose of voting upon some other subject? In either case the actual number of voters at the polls is shown, and the evidence furnished. The result depended upon the vote of the majority. The evidence showed, affirmatively, that a majority had failed to vote. Yet, with this positive evidence, the measure having received a majority of the votes given, the court considers those not voting as acquiescing in the result declared by those who did vote. It was the duty of the eleven men to vote, and when they failed or refused to perform that duty, and threw the burden of it upon the remaining nine, the decision of the latter prevailed. Their duty as voters is just the same, whether there are one or a dozen questions to be determined, and is the same as to each question. Could they then, burdened with this duty, go to the polls, vote upon one proposition, utterly ignore all the others, and then be afterward heard to object to the result declared on the other propositions by those who had used their judgment and expressed their will through the ballot?

If those who enacted the law did not deem the question of such vital importance to the community that it should require more than a majority of the votes cast for and against it, then the intent of the law and law-makers is carried out by measuring the result by the votes cast on the proposition. Guided by the rule that a citizen who, in omission of his plain duty, refrains from voting, is bound by the result declared by those who exercise their prerogative and controlled by the express provisions of the act, which provides that the inspectors and judges of the election shall report the result of "such election" at which the people were to "vote upon the question of union or annexation," and upon such

return the common council and board of trustees shall, by resolution, declare the result, and that such resolution shall be binding upon everybody.

We feel that the decision of the circuit court should be in all things reversed.

The judgment of the lower court is reversed, with instructions to hold the record of the resolution conclusive evidence of such union or annexation.

HOWARD, J., did not participate in this opinion.

Filed June 22, 1894.

No. 15,867.

JACKSON *v.* WEAVER.

MORTGAGE.—*Strict Foreclosure.—Can not be had Against Owner of the Fee.—Purchaser at Sheriff's Sale.—Parties.*—In 1876, B. recovered a judgment against C. who was at the time the owner of certain real estate, which judgment became a lien on the land. The land was sold by the sheriff, on execution issued on this judgment, on February 17, 1877, to J. and J. received a sheriff's deed for the same, March 16, 1878. W being the owner, by assignment, of a mortgage on such land, executed June 17, 1875, by C. and wife, brought suit January 8, 1878, against C. and wife, to foreclose the same, to which action J. was not made a party, and obtained a decree foreclosing the same March 11, 1878, and the land was sold to W. May 11, 1878, for which he received a sheriff's deed June 20, 1879. W. brings suit against J. for the purpose of obtaining a decree in *strict* foreclosure.

Held, that J. by his purchase at sheriff's sale, became the owner of the fee, of the land in dispute, and was such owner at the time the action for strict foreclosure was brought.

Held, also, that a strict foreclosure can not be had against one who owns the fee to the land; but is only applicable against one who has an equity of redemption which has not been cut off or barred.

Held, also, that as J. was not a party to the suit of W. to foreclose his mortgage, the decree in that case can in no wise affect J.'s rights.

From the Tippecane Circuit Court.

W. H. Bryan and *E. A. Greenlee*, for appellant.

COFFEY, J.—Since the appeal in this case was perfected, the appellee, Patrick Weaver, has departed this life, and his heirs at law have been made parties in his stead.

The undisputed facts in the case are as follows: For some years prior to 1878 Peter Cheesman was the owner of the land involved in this action. On the 11th day of February, 1876, John W. Beasley recovered a judgment in the Tippecanoe Circuit Court against Cheesman, which became a lien on the land at the time of its rendition. The land was sold by the sheriff, on an execution issued on this judgment, on the 17th day of February, 1877, and the appellant, Daniel Jackson, became the purchaser. He received a sheriff's deed on this sale, dated March 16th, 1878. The appellee, Patrick H. Weaver, being the owner by assignment of a mortgage on the land, executed on the 17th day of June, 1875, commenced an action on the 8th day of January, 1878, against Cheesman and wife to foreclose the same, and obtained a decree on the 11th day of March thereafter.

The appellant was not made a party to this action. The land was sold to the appellee, on this decree, May 11th, 1878, and on the 20th day of June, 1879, he obtained a sheriff's deed to the same.

This suit was brought by the appellee against the appellant, for the purpose of obtaining a decree in strict foreclosure. The complaint alleged the facts above stated, the court sustaining a demurrer to the complaint, and by leave of court he filed an additional paragraph. In this additional paragraph, the appellee alleged that the appellant, Jackson, held the land in trust for him, and he sought a decree quieting title. The appellant filed a cross-bill, in which he alleged that the appellee had been in possession of the land as mortgagee and sought an accounting for rents and profits and permission to re-

deem from the Cheesman mortgage. To this cross-bill the appellee filed an answer alleging the facts in the case as above stated, and again prayed a decree in strict foreclosure. To this answer the court overruled a demurrer. Upon a final hearing of the cause the court found that Jackson was the owner of the land, stated the amount due on the Cheesman mortgage, and entered a decree in strict foreclosure against the appellant, Jackson, requiring him to pay into court, for the use of the appellee, Weaver, the amount found to be due on the mortgage within thirty days, and in default of such payment that the title should be quieted in the appellee.

Among other errors assigned it is alleged that the court erred in overruling the demurrer of the appellant to the answer filed by the appellee to the cross-bill.

We are not favored with a brief on behalf of the appellee, and for that reason have no means of knowing the views of his counsel upon the questions presented by the record. We are of the opinion, however, that the court below erred in overruling a demurrer to the answer to the appellant's cross-bill. By his purchase, under the Beasley judgment, the appellant became the owner of the fee to the land in dispute, and was such owner at the time this suit was instituted. Not having been a party to the suit of the appellee to foreclose his mortgage, the decree in that case in no wise affected his rights. His title could not be divested in a foreclosure proceeding to which he was not a party. *Curtis* v. *Gooding*, 99 Ind. 45; *Pauley* v. *Cauthorn*, 101 Ind. 91; *Abbott* v. *Union Mutual Life Ins. Co.*, 127 Ind. 70.

A strict foreclosure can not be had against one who owns the fee to land. Such a foreclosure can only be had where the statutory foreclosure and sale are inappropriate.

It proceeds upon the theory that the mortgagee or pur-

chaser has acquired the legal title and obtained possession of the mortgaged estate, but that the right and equity of redemption of some judgment creditor, junior mortgagee or other person standing in that situation has not been cut off or barred. In such cases the remedy by strict foreclosure is appropriate, but it can never be used to divest the fee when it is once vested in some one other than the mortgagee or purchaser. *Jefferson* v. *Coleman*, 110 Ind. 515.

In this case, as we have seen, the fee was not in the appellee, but was in the appellant, and for that reason the remedy by strict foreclosure was inappropriate.

Judgment reversed, with direction to sustain the demurrer of the appellant to the appellee's answer to the cross-bill, and for other proceedings not inconsistent with this opinion.

Filed Sept. 27, 1894.

No. 16,877.

BENNETT ET AL. *v.* CLOSSON.

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NEW TRIAL.—*As to Part of Issues.—Rule as to.*—In order that a new trial may be granted as to part of the issues, it must clearly appear that the issues to be decided are wholly between the parties as to whom a new trial is asked, and that the rights of the other parties to the original action will not be affected.

SAME.—*As of Right.—Rule as to.*—It is only in actions for the recovery of real estate and to quiet title to real estate that the losing party may have a new trial as of right under the statute, section 1064, R. S. 1881; and if two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, one being of the class in which a new trial as of right may be granted and the other not, the latter will control the procedure, and a new trial as of right will be denied.

From the Cass Circuit Court.

J. C. Nelson and *Q. A. Myers*, for appellants.

D. D. Dykeman, *W. F. Wilson* and *G. C. Taber*, for appellee.

HOWARD, J.—On the 8th day of September, 1890, Lydia A. Locke, administratrix, one of the appellants, filed her complaint in the court below, against the appellee and wife, and also against the appellant Samuel R. Bennett and wife, alleging that on and prior to February 2, 1889, said Bennett was the owner of certain real estate described, situated in Cass county, Indiana; that on said day, his wife joining, he executed to said Closson a conveyance for said land, in form a warranty deed, but in point of fact a mortgage, to secure an existing indebtedness from Bennett to Closson, in an amount to the plaintiff unknown; that after the making of such conveyance Bennett had no property subject to execution, and has not since had any; that on the 25th day of March, 1889, the plaintiff recovered against Bennett a judgment in said court in the sum of $377.80, which is due and unpaid; that at the time of the making and receiving of such conveyance Closson had notice of the pendency of the suit, which culminated in plaintiff's said judgment, and took said mortgage in the form of a warranty deed for the purpose of cheating, hindering and delaying the creditors of Bennett, and especially plaintiff; that on the 3d day of February, 1890, Bennett and wife executed to Closson a second conveyance in form of a quitclaim deed for the same land, which plaintiff alleged to be also a mortgage to secure the same debt; asking that Closson be required to account for the rents of said real estate; that he make known the amount due him from Bennett, and that she be permitted to redeem said land from said mortgage debt, filing also a *lis pendens* notice.

To this complaint all the defendants answered in general denial. At the same time, Closson filed his cross-complaint against the plaintiff and the other defendants, bringing in also other parties having or claiming prior liens on said real estate.

The cross-complaint is in two paragraphs.

In the first paragraph it is admitted that the deed made to Closson by Bennett, February 2, 1889, was, in effect, a mortgage to secure a debt of $2,100 due Closson; it is also admitted that plaintiff recovered judgment, as alleged, against Bennett. The cross-complainant then alleges that to protect his said mortgage lien he was obliged to pay certain prior liens on said land, also taxes; that the total amount so due him is three thousand, five hundred dollars; that said property is not sufficient in value to satisfy said debt and prior liens without applying the rents and profits pending the suit; praying that his mortgage be foreclosed, also mortgage securing prior liens which he was compelled to pay; that a receiver be appointed to collect the rents and profits; that the land be sold for payment of debt, and other proper relief.

In the second paragraph of the cross-complaint the same allegations and admissions are made. It is further alleged that the quitclaim deed of February 3, 1890, conveyed to Closson the equity of redemption in said land, but that such conveyance was, in all things, subject and pursuant to his rights under the deed or mortgage of February 2, 1889, "which is still in full force, unpaid and unsatisfied, and was in no sense intended to be an extinguishment of his rights under said original deed."

It is also alleged that the cross-complainant has offered to allow plaintiff to redeem said land from his said debt, but that she has failed to so make redemption, "and her said judgment and claim of right to redeem is a cloud on cross-complainant's title"; that Bennett is insolvent

and irresponsible; that said property mortgaged and so held by cross-complainant is not of sufficient value, after paying the prior mortgage lien of the cross-defendant Haney, to pay the sum due cross-complainant upon a redemption by said Locke."

The prayer is that a receiver be appointed to take care of the crops; that cross-complainant's rights under the deed or mortgage of February 2, 1889, be declared by the court, and the amount due him be fixed; "and that foreclosure be decreed thereof against said Lydia A. Locke, administratrix of the estate of Abia Locke, deceased; and that said Locke be required to redeem at once from said mortgages, or that on failure to so redeem she be forever barred and enjoined from setting up any right to said property or to redeem the same, and that cross-complainant's title be quieted against all cross-defendants, except William E. Haney, executor of William W. Haney's will; that his lien for his rental be enforced against the crops in the hands of Samuel R. Bennett, and that the receiver of the court sell the same on the court's order or divide and deliver to this cross-complainant his share thereof; that he recover costs and all other proper relief."

To this cross-complaint the appellant Samuel R. Bennett answered in three paragraphs: (1) a general denial, (2) a plea of payment, (3) averring that both deeds mentioned were given to secure indebtedness from Bennett to Closson, that part of said indebtedness was paid, and asking for an accounting and that he be permitted to redeem. Answers were also made by Lydia A. Locke and other cross-defendants.

In reply to the third paragraph of Bennett's answer to the cross-complaint the cross-complainant said that the quitclaim deed of February 3d, 1890, "was in settlement

of all accounts theretofore had between said Bennett and cross-complainant, and upon the consideration of the debt then due said cross-complainant;'' that said deed was an absolute conveyance of the land and of the equity of redemption thereof, the prior mortgage, or deed, being kept alive only for the protection of cross-complainant against judgment creditors of Bennett.

The court found the facts substantially as alleged in the complaint and cross-complaint, finding the debt due the cross-complainant to be $2,356.04, and that said sum should be paid to him by the plaintiff within ninety days, upon which payment ''the plaintiff should be subrogated, by virtue of such redemption, to all the rights held by said Edgar D. Closson under and by virtue of said mortgage of February 2d, 1889, and the said prior liens hereinbefore described,'' subject to prior lien of the defendant, Haney; that the property ''should be sold by the sheriff for the payment of the amount so paid in redemption;'' that on failure of the plaintiff to so redeem, her right and equity of redemption ''should be barred, and that the title of said Edgar D. Closson in and to said real estate should be quieted as against said Lydia A. Locke.''

''And the court further finds for the cross-complainant, Edgar D. Closson, on the second paragraph of his cross-complaint, that he is the owner of the real estate in said cross-complaint described under the deed executed by Samuel R. Bennett and May R. Bennett to said Closson, February 3d, 1890, which the court finds to be an absolute conveyance of the title to said real estate, and that as such owner said Edgar D. Closson is entitled to have his title to said real estate quieted against the plaintiff, Lydia A. Locke, administratrix of the estate of Abia Locke, deceased, subject only to her right of redemption within ninety days from this date, as found by

the court." It was also found that the appellants, Bennett and wife, were tenants and lessees of the appellee as to the lands in question, under lease dated February 3d, 1890, and should account to him for rents and profits thereof.

Bills of exception were filed by the plaintiff. The plaintiff also moved the court to modify the finding, and in arrest of judgment, likewise for a new trial, all of which motions were overruled.

In the decree of the court it was ordered that the plaintiff, Lydia A. Locke, administratrix, be permitted to redeem from the mortgage of the appellee, Closson, by payment of said sum found due him of $2,356.04, and that on such redemption she be subrogated to his rights under said mortgage, and the land be sold in payment of the amount so paid by her and the amount of her judgment.

It was further decreed that the appellee, Closson, is the owner of said real estate, and that his title thereto be quieted as against all the defendants to the cross-complaint, except Haney, executor, the holder of a prior lien, and subject to said right of redemption, decreed the plaintiff within the period of ninety days therefrom, and that the defendants, except said Haney, and the plaintiff, except as to her right of redemption, be barred and forever restrained from setting up any claim of title to said property. The appellant, Bennett, was also ordered to account to appellee for the rental of said land.

The plaintiff duly prayed an appeal to this court, which was granted; but it does not appear that such appeal was ever perfected. No objection or exception to any of the proceedings or rulings of the court seem to have been made by appellants or any of the other defendants to the cross-complaint.

On the 27th day of September, 1892, being within one

year from the date of the decree, the appellants appeared in court, and severally moved the court "for a new trial of this action as of right on the cross-complaint of Edgar D. Closson."

This motion was overruled by the court, and the propriety of such ruling is presented as the only question for our consideration.

It is first contended by counsel for appellee that the motion for a new trial as of right "on the cross-complaint of Edgar D. Closson," is not in form to raise any question, and was properly overruled, since a new trial can be granted only as to the whole case.

This seems to have been the decision of this court in the case of *Johnson* v. *McCulloch*, 89 Ind. 270. In that case it was held that a motion by a defendant for a new trial upon "his paragraphs of counterclaim and set-off," though they were the only pleadings upon which issues were made, raised no question; that the motion should have been for a new trial generally.

Peed v. *Brenneman, Jr.*, 72 Ind. 288, was a case in relation to the location of a public highway, in which there was a remonstrance on account of the inutility thereof and for damages. The verdict was in favor of the public utility of the highway, but as to one of the remonstrants found neither for nor against him on the question of damages. It was held that the verdict was so defective that a judgment could not be rendered thereon as against such remonstrant, and that he was entitled to a *venire de novo* for the trial of the whole cause, including the question as to the public utility of the highway; and also that this would open up the whole question of public utility of such highway, not only as to him, but also as to the other remonstrants. "A new trial," said the court, "implies a reëxamination of all, and not a

part only, of the issues between the parties as to whom it is granted."

It would seem that the cases of *Bisel* v. *Tucker*, 121 Ind. 249, and *State, ex rel.*, v. *Templin*, 122 Ind. 235, are to the same effect.

It may be admitted that if the issues to be decided are wholly between the parties as to whom a new trial is asked, and the rights of the other parties to the original action will be unaffected by the new trial, then a new trial may be asked and granted as to such issues. But the necessary conditions should clearly appear.

Such a case was that of *Houston* v. *Bruner*, 39 Ind. 376, where the holder of a promissory note had obtained judgment against two parties liable thereon, and it was held that one of the parties liable on the note might have a new trial against the other to determine the question of suretyship between themselves, without affecting the judgment against both in favor of the holder of the note. This was in accordance with the provisions of the statute. Section 1226, R. S. 1894 (section 1212, R. S. 1881).

In the case before us, we do not think that the issues on the cross-complaint can be separated from the other issues in the case, and fairly determined without prejudice to the rights of other parties. As to the plaintiff, Lydia A. Locke, it does not appear from the record whether she availed herself of her right to redeem from the debt of the appellee within the ninety days given her. If she did so redeem, certainly her rights in the land as redemptioner should be considered in the new trial.

If she did not so redeem, as seems to be taken for granted, and her right to do so is now barred under the judgment, it is equally clear that she would have an interest in the new trial which ought to be considered. She may have been unable to advance the amount needed to pay Closson's debt and so protect her judgment. The

court may have erred in finding the debt too great, as she claimed on the trial. Bennett, against whom she holds her judgment, is found to be insolvent; and if he should succeed in recovering title to the land, her judgment lien against it would be good.

It is clear, therefore, that Closson's and Bennett's rights are not the only ones involved; that other issues than those on the cross-complaint must be considered; and that if a new trial should, in any event, have been granted, it should have been granted on the whole case, and not on certain pleadings, as to part of the issues and some of the parties, to the exclusion of other pleadings, issues or parties. The granting of a new trial should place the parties in the same position occupied by them before the first trial.

It would appear, therefore, that the motion for a new trial, "on the cross-complaint of Edgar D. Closson," was not well made, and that it was properly overruled, whether a motion for a new trial as to the whole case, if made, should have been sustained or not.

But it is not clear that a new trial, as of right, should have been granted in this action, even as to the whole case.

In actions for the recovery of real estate, and to quiet title thereto, the losing party may have a new trial, as of right. Section 1076, R. S. 1894 (section 1064, R. S. 1881).

The decisions of this court have, however, tended to confine the right strictly to the cases provided for in the statute. And if two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, it has frequently been held that if one of them would entitle the losing party to a new trial, as of right, and the other would not, then that cause in which a new trial, as of right, would not

be allowed will prevail, and a new trial will not be granted. *Butler University* v. *Conard*, 94 Ind. 353; *Bradford* v. *School Town of Marion*, 107 Ind. 280; *Wilson* v. *Brookshire*, 126 Ind. 497; *Richwine* v. *Presbyterian Church of Noblesville*, 135 Ind. 80.

In this case the complaint discloses an action to have a deed, warranty in form, declared a mortgage, and to permit the plaintiff as holder of a junior judgment lien to redeem from the mortgage and to be subrogated to the rights of the mortgagee. The first paragraph of the cross-complaint admits such deed to be a mortgage, and shows an action to have the mortgage foreclosed. The second paragraph of the cross-complaint makes the same admissions as to the warranty deed, asks to have foreclosure decreed, and that the plaintiff be required to redeem therefrom in ninety days; on failure of such redemption the action is, to have cross-complainant's title quieted under a quitclaim deed to the same land.

These causes of action all proceeded to a finding by the court and to judgment. Plaintiff was given the right of redemption and subrogation, and the land was ordered sold in payment of amount due her. In the same decree, and subject to the rights so given plaintiff, the title of cross-complainant under his quitclaim deed was quieted, and all parties were barred and restrained from setting up claim or title to the property.

As to the actions for redemption, subrogation, and foreclosure, it does not admit of question that a new trial as of right is not allowable. These are substantive causes of action in the case, and, under the decisions cited, must control. A new trial of right can not be granted in the whole case.

In addition, it may be doubted whether even the second paragraph of the cross-complaint, taken by itself, and striking from it everything that relates to redemption,

subrogation, and foreclosure, shows a cause of action to quiet title. As a complaint to quiet title, it would certainly be insufficient on demurrer. *Second Nat'l Bank, etc.*, v. *Corey*, 94 Ind. 457; *Miller* v. *City of Indianapolis*, 123 Ind. 196.

This paragraph is rather an action for strict foreclosure and injunction. The whole action is one for the collection of debts from Bennett, the judgment debt due Locke, and the mortgage debt due Closson, involving also the appointment of a receiver and an accounting. The question of title to land is incidental.

The motion for a new trial as of right was properly overruled.

The judgment is affirmed.

Filed Sept. 19, 1894.

No. 17,288.

Beasley *v.* The State.

Criminal Law.—*Larceny.*—*By Husband of Wife's Money.*—Under the enabling statutes of this State the husband's interest in his wife's personal property is abolished, and he may be convicted of the larceny of her money.

Same.—*Larceny by Trick and Artifice.*—One who obtains money or goods by some fraudulent trick or artifice, and carries them away, is guilty of larceny.

Same.—*Facts of Case.*—For facts held sufficient to constitute larceny by a husband of his wife's money, by trick and artifice, see the opinion.

From the Pike Circuit Court.

E. A. Ely and *S. G. Davenport*, for appellant.

A. G. Smith, Attorney-General, *W. E. Cox*, Prosecuting Attorney, and *A. J. Beveridge*, for State.

Beasley *v.* The State.

DAILEY, J.—In this case the appellant, Alfred D. Beasley, was charged, by indictment, with the larceny of two hundred and sixty-five dollars in money, and one watch of the value of twenty-five dollars, of the goods and chattels of Ena C. Beasley, who was then his wife. The appellant moved to quash the indictment, which motion was overruled by the court, and exceptions were properly reserved by him. There was a trial by the court, and finding of guilty, and his punishment assessed at imprisonment in the State prison for six years, and a fine of five dollars.

The appellant moved for a new trial and filed his written reasons therefor, which was overruled by the court and excepted to by him. Judgment was rendered upon the finding, from which this appeal is prosecuted.

The assignment of errors presents two questions:

First. Was the verdict sustained by the evidence?

Second. Can a married man commit larceny as to the goods of his wife?

We will consume little time in the consideration of the first question. The evidence in the record presents a case against this appellant of extreme moral turpitude. From beginning to end it is fraught with shame and ignominy. On January 7, 1894, he and Ena C. Thompson were married in the State of Ohio. She was possessed of an estate of about two hundred and sixty-five dollars, consisting of money loaned, inherited from a deceased grandmother. He obtained from her a twenty-five dollar watch, induced her to collect all this money, and assisted in doing so. By his persuasion she gave him ten dollars before starting for Petersburgh, Indiana, placed fifty dollars in her dress pocket and sewed two hundred and five dollars in the lining of her skirt. When they reached Newark, O., he took the fifty dollars and insisted upon her giving him the remaining two hundred

and five dollars, under the pretense that it was not safe to carry it, and he would take it and get a draft. He paid their expenses, including their transportation out of the sixty dollars thus obtained. At Cincinnati, O., they repaired to a boarding-house, where he performed the delicate operation of cutting the skirt, from which he abstracted the two hundred and five dollars already mentioned. As an excuse for the act, he said he would buy a draft for the amount. He went up street, as he stated, for that purpose, and returned falsely informing her that he had bought one and mailed it to Petersburg. They went by boat from Cincinnati to Louisville, Ky., and the spouse engaged with others on the way in card playing until midnight. When they arrived at Louisville they went to a hotel, after which he rode out in a cab without her.

They embarked on a boat for Evansville, Indiana, and the defendant indulged his passion for playing cards during the entire trip. They put up at a hotel and registered. Thereupon he left her and was gone about the city until 12 o'clock at night. When he returned he said he was going to Henderson to stay two or three days with friends, and that she could remain in Evansville. After he had fallen asleep she took her watch and money from his clothing and concealed the money in her sleeve. When he woke the next morning he missed the watch and saw that the money was gone. He said they had been robbed, notified the landlord and called detectives. When a detective came she told the story and surrendered the money and watch to him. He advised her to keep them, and gave them back to her. They were ejected from this hotel and went to another. Appellant borrowed $5 of her upon the excuse that he wanted to pay it to one Posey, whom he owed. He went up street and bought a revolver and cartridges, returned, entered

the room his wife occupied, said he was "mad," stood with his face to the window and his back to her, loading the weapon, snapped it once or twice, said he "would not snap it any more," "the next one was loaded." The wife said "you don't need to kill me." He replied: "I may have to use it on myself." "God knows what you will do next." "I am too mad to talk about the money." "Give me that money." She gave him $5 and said, "is that enough?" and he said "no." She then gave him $10 and asked if that was enough, and he said "give me the rest." She then gave him $185, all the balance she had. He was standing with the loaded pistol in his pocket when she gave him the money. She was afraid of him; says she did not part with her money voluntarily nor of her own free will.

They left Evansville, passed through Petersburg, went to Washington, Ind., and put up at a hotel. He registered her as "Miss Thompson, Newark, O." But it seems she did not know this fact until the next morning, when she received the following infamous letter:

"OFFICE OF THE TRUSSLER HOUSE,
"HENRY KLOHR, PROP.,
"Location opposite O. & M. depot, in central section of city.

"WASHINGTON, IND., Jan. 18, 1894.

"*Ena:* Enclosed find $25 to pay your fare home. It is now 12 o'clock, and I leave in about 20 minutes for St. Louis. I lost all your money to-night on a poker game. Your board bill is paid. You are registered as Miss Thompson, of Newark, so be careful you do not say you are married. I saw mother. She would see that your trunk was expressed to you, but she did not want to see you. I join my brother Will at St. Louis. Good-bye. Yours, AL."

All this transpired during the honeymoon. It seems,

from the record, that the wife was induced to come to Indiana upon the promise that the defendant would establish their home at Petersburg so she could invest her means in a newspaper enterprise. When she was inveigled into this State, and was looted of her inheritance, the defendant was gracious enough to surrender $25 of the plunder he had taken from her, so that she might not be compelled to walk back to the State of Ohio.

The wedding tour being thus completed, and the appellant in possession of the most of his booty, the betrayed wife went to Petersburg to see his mother. Not obtaining satisfaction, she then began proceedings against him and left for her home in Ohio. While there she received from him insulting and infamous letters, too vulgar and indecent to be copied into this opinion, threatening to cover her with shame and disgrace if she did not abandon the prosecution. This is, in short, the brief, pathetic story of her wrongs. There is no denial; no palliation. But it is said there was no larceny because the money was not taken from the prosecuting witness without her consent. It is well settled that where one obtains money or goods by some fraudulent trick or artifice, and carries them away, he is guilty of larceny. Moore's and Elliott's Ind. Crim. Law, section 368, and cases there cited.

The main contention upon which appellant's counsel rely, in their able brief, is that husband and wife, living together as such, can not steal one from the other; that to constitute a valid charge of larceny, the indictment should show that at the time of the alleged crime they were living separate and apart, and that the taker then had neither the possession nor right to possession of the other's property. This is urged at great length, with liberal quotations from the common law and sacred history to the effect that husband and wife are one person,

and hence incapable of larceny one from the other. Such was the law for ages, and so remains unless overthrown by the legislative enactments of 1881, and prior thereto.

By section 5324, R. S. 1881, Burns' Rev. 1894, section 7289, marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not under certain disabilities therein specified, are capable of entering. The only difference between it and other contracts is that marriage is the more priceless and sacred.

By section 5115, R. S. 1881, Burns' Rev. 1894, section 6960, all the legal disabilities of married women to make contracts are abolished, except as further provided in the act of which it is a part.

Section 5117, R. S. 1881, section 6962, Burns' Rev., 1894, provides that: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were (sole and) unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal property; and she may also, in like manner, make any contracts with reference to the same," etc.

The same section also provides that "she shall be bound by an estoppel *in pais*, like any other person."

Section 5118, R. S. 1881, Burns' Rev., 1894, section 6963, binds a married woman by her covenants of title in conveyances of her separate property, as if sole, and, in like manner, as principal on her official bond.

Section 5120, R. S. 1881, Burns' Rev., 1894, section 6965, makes all married women liable for torts com-

mitted by them, and exempts the husbands from liability from the contracts or torts of their wives.

Section 5130, R. S. 1881, Burns' Rev., 1894, section 6975, vests a wife with the earnings or profits accruing from her separate trade or business.

Section 5131, R. S. 1881, Burns' Rev., 1894, section 6976, empowers her to prosecute or maintain actions in her own name against persons for damages for injuries to her person or character, the same as if she were sole; and gives her the money so recovered.

Prior to the enactment of the several sections of the statutes of this State the common law fiction prevailed of the legal unity of husband and wife. In the eye of the law they were one person, and the husband was that person.

In Blackstone's Comm., book 2, *433, the old rule is thus stated: "A sixth method of acquiring property in goods and chattels is by marriage; whereby those chattels which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and the same powers, as the wife, when sole, had over them. This depends entirely on the notion of a unity of person between husband and wife; it being held that they are one person in law, so that the entire being and existence of the woman is suspended during coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, absolutely vested in the husband."

The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts and doing whatever a *feme sole* might do; and that the effect of such

statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes, a woman may hold her own property; make her own money; enter into her own contracts; pay her own debts. She may even contract with her own husband. If he defrauds her she may recover. If a woman may contract, under these statutes, with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that if performed by another it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them.

In *Garret* v. *State*, 109 Ind. 527, the defendant was indicted for burning the property of "another person," to wit: The property of Hannah Garret. The evidence showed that he and his wife Hannah, the owner of the dwelling house so destroyed, occupied, used, and dwelt therein, as their habitation, and yet this court said: "If a man unlawfully, feloniously, willfully and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute."

Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and if the husband can commit the crime of arson against her private property it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods.

In our opinion the judgment of the trial court should be, and it is, affirmed.

Filed Sept. 21, 1894.

No. 16,897.

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MURPHY *v.* BEARD.

GRAVEL ROAD.—*Assessment Lien.—Statute Construed.—Act of 1877.—Act of 1885.*—The provision of the act of 1877, providing that a gravel road assessment shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes, was not qualified or limited by the act of 1885 providing that such lien shall relate to the time of the filing of the petition.

SAME.—*Assessment Lien.—Senior to Other Ordinary and Pre-existing Liens.*—The lien provided for in such act (act of 1877) is senior to pre-existing and subsequent ordinary liens.

SAME.—*Assessment Lien.—Priority of.—Power of Legislature to So Enact.—Constitutional Law.*—The Legislature has the power to enact that such assessment liens shall take precedence over other pre-existing liens, upon the theory that the improvement enhanced the value of the security.

SAME.—*General Notice.—When Presumed to Have Been Given.—Binding on Mortgagee and Purchaser Under Mortgage.*—The general notice required in a gravel road proceeding, which, in the absence of allegations to the contrary, will be presumed to have been given, is sufficient to bind a mortgagee of the land affected by such proceeding; and the purchaser under such mortgage, after the assessment, is bound by the proceeding which bound the mortgagee.

MORTGAGE.—*Mortgagee Takes Subject to the Rights of the Public.—Priority of Liens.—Eminent Domain.*—As the purchaser of real estate takes the property subject to the implied paramount right of the public, so the mortgagee takes his mortgage with notice of such paramount right, and must submit to its subsequent exercise.

From the Huntington Circuit Court.

T. G. Smith, for appellant.

L. P. Milligan, *S. E. Cook* and *O. W. Whitelock*, for appellee.

HACKNEY, C. J.—The record presents the question of the sufficiency of two paragraphs of complaint to which the circuit court sustained a demurrer.

The facts alleged in each paragraph were that the appellant held a tract of land by purchase under a mortgage of September, 1872, a foreclosure in April, 1879, a sale in 1889, and a sheriff's deed in 1890; that the appellee, as treasurer of Huntington county, was threatening to enforce against said land certain assessments of benefits from the construction of a free gravel road, which assessments were apportioned and charged against said land in proceedings instituted before the board of county commissioners in March, 1881, and terminated before the appellant's purchase.

It was also alleged that neither the mortgagee nor the purchaser was a party to the proceeding in which said assessments were made.

The relief sought was, by the first paragraph, an injunction against the enforcement of said assessments, and, by the second paragraph, a decree that said assessments were junior to said mortgage and that the county's right of redemption be foreclosed.

The assessments were made under the act of March 3, 1877; R. S. 1881, sections 5091, *et seq.*; R. S. 1894, sections 6855, *et seq*. By the sixth section of that act, it was provided that "The said assessment upon lands, under the provisions of this act, shall be placed upon a special duplicate * * * and * shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are."

One contention of the appellant is that section 8, Acts 1885, Elliott's Supp., section 1479, R. S. 1894, section 6886, adds to the foregoing provision the qualification that such lien shall relate to the time of filing the peti-

tion, and that, therefore, no authority exists for giving the assessment priority over a mortgage executed before the filing of the petition.

The act in which the provision referred to is found has been expressly held to constitute "a complete scheme or system for the construction of gravel roads, and for the method of procedure in making and collecting assessments," and that it does not repeal or otherwise affect the provisions of the act of 1877. *Robinson* v. *Rippey*, 111 Ind. 112.

Adhering to that decision, we conclude that the act of 1885 does not qualify or limit the lien provided by the act of 1877.

It is further insisted that the mortgagee and the purchaser at the foreclosure sale, not having been parties to the gravel road proceeding, are not bound by the assessments. The act of 1877 does not contemplate adversary proceedings; nor that special notice shall be given, especially to the land-owners, incumbrancers or others interested. The jurisdiction of the board is invoked by *ex parte* petition, and all persons interested are notified by a general notice of the time and place of the viewers' meeting, the kind of improvement sought, and the places of beginning and terminus of the road, and of any intermediate points. After notice, exceptions may be filed and heard and further proceedings continued.

If, therefore, the mortgagee was a proper or necessary party to the proceeding, the general notice, which, we presume, in the absence of allegations to the contrary, was given, was sufficient to bind him as a party to the same extent as if he had been specially named and notified as a party. As to the purchaser, his interests did not attach until after the assessments were made, and it could not have been anticipated that he should be named as a party. Being a purchaser under the mortgagee, it

is perfectly clear that he would be bound by any proceeding which bound the mortgagee.

It remains to be determined whether the mortgagee, treated as a party, lost the priority of his mortgage as against the assessments. It will be observed that the enactment of the statute under which the proceedings were had was subsequent to the execution and recording of the mortgage, and it will be observed also that by the language of the statute the assessments were to "constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are."

The appellant insists that the intention of the Legislature to make this provision retroactive is not manifest, and that under the rules of statutory construction it should be held to have only prospective application, and, further, if held to be retroactive, that the Legislature exceeded its power in depriving the mortgagee of a vested right in the property and in an established security.

To the first of these propositions counsel cite *Cook* v. *State, for Use*, 101 Ind. 446, where it was held that, under section 4278, R. S. 1881, providing that the amount of the assessments upon lands for the construction of drains "shall be a lien upon the lands so assessed, from the date of recording notice," etc. Such assessments were not senior to a prior mortgage.

The language of the two statutory provisions is so widely different as to deprive the construction of either of any force in the construction of the other. In the case cited, it could not have been held that the Legislature intended to give the lien so created precedence over liens perfected before the recording of the notice of the establishing of the work. In the present case the statute provides, as we have seen, that the lien is constituted and is to be considered "a first lien on the real estate assessed, in the same manner as other taxes are."

We have no doubt of the intention of the Legislature in this instance to constitute such assessments a lien senior to pre-existing and subsequent ordinary liens. The language that they shall be "a first lien * * * as * taxes are," could hardly have been more expressive of such intention.

The remaining inquiry, therefore, is as to the power of the Legislature to so enact. That the assessment charged against the lands mortgaged was for a public purpose is without dispute, and the right to make it rests upon the powers and doctrines both of eminent domain and of taxation, just as private property may be taken for public streets, highways, drains, viaducts and other public uses; as burdens may be levied for the public uses, and as the benefits derived from the special advantages gained by such property, from the location of any such public use or improvement may be made a special charge against it. The ownership in fee of the real estate affected by such uses, while a vested right, is not more sacred than the right of the public to appropriate such real estate to such uses. When ownership is acquired, it is necessarily with the implied understanding that it is subject to this paramount right of the public. It is needless that we should multiply illustrations or cite authorities to these propositions so well settled and so often observed. Treating the appellant's security as a vested right, we may ask, is it more potent against the rights of the public than the ownership of the land itself? Certainly not.

In *State, ex rel.*, v. *Ætna Life Ins. Co.*, 117 Ind. 251, it was said: "We have no doubt that it would have been within the power of the Legislature to provide by express words that the lien should have priority over preëxisting mortgages. *Provident Institution* v. *Jersey City*, 113 U. S. 506."

The case there cited differs from the present only in the fact that the law authorizing the lien was enacted before the execution of the mortgage lien. If, however, we are correct in the proposition that a purchaser takes title with the implied paramount right of the public for the uses named, the lienor takes his mortgage and makes his loan with notice of that paramount right, and must submit to its subsequent exercise.

Our quotation from *State, ex rel.*, v. *Ætna Life Ins. Co., supra*, was repeated in *Pierce* v. *Ætna Life Ins. Co.*, 131 Ind. 284, with the following statement: "Indeed, there would seem to be much reason for providing that a mortgagee, whose security is enhanced in value by the construction of a public drain, should have the lien of his mortgage subordinated to the lien of a fair assessment for the cost of its construction."

To the same effect, it was said in *Provident Institution* v. *Jersey City, supra*, that: "The law which gives to the last maritime liens priority over earlier liens in point of time, is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien law stand on the same basis of natural justice."

In *Watts* v. *Sweeney*, 127 Ind. 116, the principle above suggested was applied to the lien of a mechanic making repairs upon a chattel.

If the gravel road enhanced the value of the security, and it is upon the presumption that it did that the assessment was authorized and was made, it is only equitable to charge the assessment against the land senior to the mortgage; and if the power to do so were denied, the necessary functions of government, exercised under the powers of eminent domain, could be obstructed and prac-

tically defeated by the execution of liens by the property-owner opposed to public improvements.

In our opinion the ruling of the circuit court, in sustaining the demurrer to the complaint, was correct, and the judgment is affirmed.

DAILEY, J., did not participate in this case.

Filed Sept. 21, 1894.

No. 16,598.

THE TOWN OF FOWLER *v.* LINQUIST.

HIGHWAY.—*Dedication.—Prima Facie Evidence of.—Recorded Plat.—Street.—Personal Injury.—Incorporated Town.*—In an action against an incorporated town for personal injuries sustained by reason of an obstruction in one of its public streets, the plat of the addition containing such part of the street, which was filed and recorded in the recorder's office for more than sixteen years prior to the accident, is *prima facie* evidence of ownership by the dedicator, and of his intention to so dedicate it.

SAME.—*Dedication.—Acceptance.*—Where it appears that such street was used by the public both before and ever since the dedication, and that the town authorities worked the street where such work was needed, an acceptance of the dedication is sufficiently established.

SAME.—*Street.—Obstruction (Post).—Personal Injury.—Contributory Negligence.—Frightened Team.*—Where the plaintiff's team became frightened and unmanageable and shied out of the beaten path of the road, and bringing plaintiff's wagon into collision with a post in the roadway, a few feet from the beaten path, causing plaintiff's injuries, he is not guilty of contributory negligence, even though he knew the post was in the road.

SAME.—*Obstruction.—Use of Street With Knowledge of Obstruction.*—A person is not legally compelled to forego the use of a public highway which is open to public use simply because of an obstruction therein.

SPECIAL FINDING.—*Failure to Find Fact Within the Issues and the Evidence.—When Not Ground for Reversal.—Burden of Proof.*—A failure to find a fact within the issues, which is established by the evidence, is not ground for reversal of the judgment, provided the facts essential to a recovery are found; for a failure to find upon an issue in

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such a case is equivalent to a finding against the party upon whom rests the burden of proof upon that issue.

DAMAGES.—*Personal Injury.—Combined Causes.—Several Liability.*—If two causes combine to produce injuries, defendant is not relieved of liability because it is responsible for only one of such causes; provided the plaintiff is free from contributory negligence.

From the Newton Circuit Court.

W. D. Wallace and *S. P. Baird*, for appellant.

J. D. Brown and *G. H. Gray*, for appellee.

HOWARD, C. J.—This was an action by the appellee against the appellant, to recover damages for personal injuries, alleged to have been caused by an obstruction in one of the streets of said town.

On the overruling of demurrers to the complaint, the appellant answered in general denial, and also by two special pleas, to the first of which, a demurrer was overruled, while to the second, a demurrer was sustained.

The issues joined were tried by a jury, and, by agreement, the jury returned into court their special verdict on all the issues in the cause. The material facts found are: That Park street, in the town of Fowler in Benton county, is a public street, which was laid out and dedicated many years ago, and accepted by said town, and which for many years past has been used and traveled, and was on the 27th day of October, 1891, used and traveled by the citizens of said town, and by the public; that in April or May, 1891, one Jacob Lucas erected a fence across said street, from the southeast corner of outlot twenty-nine to the southwest corner of outlot twenty-eight of Fowler's addition to said town, and within the corporate limits thereof; said fence consisted of four or five oak posts firmly planted to the depth of about two feet in the ground, with wire strung thereon, and securely fastened. In the center of said street, in said fence, was a gate fastened between two of said posts. In the

summer of 1891, said obstruction was entirely removed, except one post which remained standing, and of which appellant at the time had notice. This post stood about four or five feet above the ground, and about three feet west of the traveled part of said street; that appellant had due notice and full knowledge of said obstruction from May, 1891, and at all times since then, up to the 27th day of October, 1891, and thereafter; two of the trustees of the town having actual notice during all said time; but the town took no steps to remove the obstruction. The town marshal also had full knowledge of the obstruction during all said time; that on said 27th day of October, 1891, the appellee, who is a farmer and laborer living in the southeast part of said town, was traveling southward toward his home on said Park street, driving a span of mules hitched to a two horse wagon, with hay ladders thereon, at a slow rate of speed, in a careful and cautious manner, without any knowledge of the existence of said post, having been informed some four or five weeks prior thereto that said post had been taken up, and believing that it had been removed, and while so traveling upon said street his mules became frightened at some stray horses that were grazing in said street, without his fault or negligence, at or near said post. Said stray horses caused said mules to shy to one side, whereby the hay frame that was on said wagon collided with, and caught upon, said post, which produced a sudden jerk and shock of said hay ladders, throwing the appellee off the wagon and between the mules, without fault of his; that the appellee's leg was caught between the spokes of one wheel of the wagon, and was thereby twisted, wrenched, and broken without his fault; that said accident occurred at or near seven o'clock in the evening of said day, and when it was dark; that when said

mules became frightened, and before the hay ladders collided with the post, the appellee pulled on the lines and used every effort in his power to check the mules, but was unable to control them; that for several rods before the mules became frightened, the appellee was driving slowly, and that the mules were not accustomed to run away or to become frightened; that appellee was standing up on said hay ladders, driving the mules with lines, and looking forward to see any obstruction that might be on said street; that the street is about sixty feet wide at the place of said obstruction, and the surface of the ground is comparatively level; that the post was unguarded and without light or signals to warn travelers of its location; that said mules, while so frightened and beyond the control of appellee, drew the wagon out of the traveled part of the street and near to said post, causing the collision, after which the mules ran off with the wagon, leaving the appellee helpless upon the ground, with both bones of the left leg broken between the knee and ankle, where he remained until assistance arrived, and he was carried home; that he was at once attended by a competent physician and surgeon, who properly and skillfully treated him, and that all proper attention was given him; that the knee joint is partially, and the ankle wholly, stiff, and the leg crooked and two inches short, and the appellee maimed and crippled for life, and wholly incapable of performing manual labor or pursuing his usual avocations; that he has suffered and endured great pain and torture, both physically and mentally; that at the time of, and prior to, receiving said injuries, the appellee was a strong, healthy man, and was industrious; that he is fifty-one years of age, and has a wife and eight minor children who are wholly dependent upon him for support; that by reason

of said injuries, he has sustained damages in the sum of six thousand dollars.

A motion for a *venire de novo* was overruled. A motion for a new trial having been filed, the appellee filed a *remittitur* of one thousand dollars of the damages allowed by the verdict of the jury, whereupon the motion for a new trial was overruled.

The appellant then filed a motion for judgment in its favor upon the verdict, which was also overruled.

Judgment for five thousand dollars was then rendered in favor of appellee.

After the evidence was given, and before the argument of counsel, the appellant moved the court to instruct the jury to return a verdict for the appellant, on the ground that appellant was not liable for the injuries suffered by appellee. This motion was overruled, which ruling is made one of the grounds of the motion for a new trial. The motion for a verdict in favor of the appellant is brought into the record by a special bill of exceptions.

Many assignments of error are made, but the chief reason urged why the judgment should be reversed, is that it was not shown that the place where the injury was received was a public street.

It is not questioned that in 1875, more than sixteen years before the time of the injuries complained of, Fowler's addition to the town of Fowler, including Park street and the place therein where the injuries were received, was duly platted and the plat acknowledged and recorded.

But appellant first objects that no proof, other than the plat, was introduced to show that at the time of making, filing and recording such plat, Moses Fowler was the owner of the land so platted.

This is not a controversy as to the ownership of the ground occupied by the street; no one claiming to be the

owner of the land occupied by the street is here as a party denying the dedication. In such case, strict proof of ownership is not required as in ejectment. There was, in the court below, no denial of ownership in the dedicator at the time of the dedication; and the evidence shows continued use of the street by the public ever since, except during the short time that the fence was placed across it.

As between the parties to this action, the plat of Fowler's Addition, on which "Park street" appears, and which was filed and recorded in the recorder's office for more than sixteen years prior to October 27, 1891, is *prima facie* evidence of ownership by Fowler of the land so dedicated, and of his intention to so dedicate it. 2 Greenleaf Ev., section 662; *Central Branch, etc., R. R. Co.* v. *Andrews*, 41 Kan. 370; *State* v. *Hill*, 10 Ind. 219. See, also, *City of Indianapolis* v. *Kingsbury*, 101 Ind. 200; Elliott Roads and Streets, p. 121 *et seq.*

It is next contended that there was no acceptance of the dedication, either by the town or by the public. The jury expressly found: "That there is a public street in said town of Fowler, named and known as Park street, which was laid out and dedicated to said town many years ago, and accepted by said town, beginning at the north limits of said town, running due south through said town to the south line of said town, which street for many years past has been used and traveled, and was, on the 27th day of October last, traveled by the citizens of said town and by the public."

This finding, even omitting what may be regarded as conclusions, is, we think, sufficiently clear to show acceptance and use of the street by the town and by the public.

We have looked through the evidence, and we think that the finding is well supported by the testimony of

witnesses; from which it appears, not only that the way was used by the public long before the dedication and ever since, but also that the town authorities worked the street when such work was needed.

The jury finds that at the point of the accident, the ground was comparatively level. No work was needed there. But there was evidence of some work by the town authorities to the north of the place of the accident, and also to the south where the town marshal aided in the erection of a bridge upon the street. As to user by the public, there was evidence from which the jury might reasonably conclude that the road had been used by the public as a thoroughfare for twenty or twenty-one years. This is sufficient. Elliott Roads and Streets, p. 125 *et seq.*, and cases cited; *Summers* v. *State*, 51 Ind. 201.

It is next contended that the appellee should not recover, for the reason that he knew of the obstruction and should, therefore, have avoided it. The appellee, however, testified positively that he did not know that the post still remained in the street, as he had been informed some time before that it had been removed. Besides, it is agreed that his mules were frightened, and the evidence is undoubted that they shied off the beaten track in spite of all efforts made by appellee to control them. The post was several feet from the traveled track, and even if appellee knew it was still there, he could not be held responsible for the frightening of his team and their going out of the beaten track and upon the post when he was utterly unable to control them. We do not think that any contributory negligence is shown. *Maus* v. *City of Springfield*, 101 Mo. 613.

Counsel point out many facts as to which they contend that there is no finding in the verdict of the jury,

but as to which they say there should have been findings under the issues. Even if this were true, it would of itself be no ground for reversal of the judgment, provided the facts essential to a recovery are found; a failure to find upon an issue in such a case is to be taken as a finding against the party upon whom rested the burden of proof upon that issue. But, we think that, omitting all conclusions of law from the verdict, there are sufficient facts found upon which the judgment may stand. Neither can we say, considering all the circumstances of the case, that the damages are excessive.

Several objections are urged against the complaint, but we think they are all without substantial merit. It is claimed that the proximate cause of the accident was not the obstruction in the street but the frightening of the team by the stray horses, and that for this reason the complaint is bad. If the town was at fault as to the obstruction, and the obstruction was one cause of the injury, the town can not escape responsibility because some other cause aided in bringing about the accident. See *Board, etc.*, v. *Mutchler*, 137 Ind. 140, where a horse driven in a buggy was frightened and backed off a bridge, but where the board of commissioners was held responsible for the accident for the reason that they had neglected to place guards upon the bridge. See also *City of Crawfordsville* v. *Smith*, 79 Ind. 308.

The court did not err in sustaining a demurrer to the third paragraph of the answer. In that paragraph it was averred, in effect, that appellee might have taken another road, and so avoided the obstruction. The road taken by appellee was the most direct to his home, and even if it were not so, he was not obliged to choose another road when this one was open to the public. *Board, etc.*, v. *Mutchler*, *supra*.

We have found no error in the record for which we should be justified in reversing the judgment.

The judgment is affirmed.

Filed April 17, 1894; petition for a rehearing overruled Sept. 25, '94.

No. 16,853.

SCANLIN *v.* STEWART ET AL.

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EXECUTION.—*Levy.—Lien.—Continuance Beyond Life of Execution.—Special Finding.—Presumption Supporting.*—A special finding that an execution issued by a justice of the peace was levied upon personal property, and that the levy continued for a period longer than six months prior to the issuing of a *vendi*, is a finding of fact, and it will be presumed, in the absence of anything to the contrary, that the evidence supported the finding that the levy, in some legal way, was maintained beyond the life of the original execution, and an exception to a conclusion of law that the lien of the execution continued is not well taken.

SUPREME COURT PRACTICE.—*Rule where Same Question Presented by Pleadings and Special Findings.*—Rulings upon pleadings will not be considered on appeal where the same questions are presented by exceptions to conclusions of law upon a special finding of facts.

PRACTICE.—*Motion to Modify Judgment.—Bill of Exceptions.*—In order that any question may be presented on appeal upon a motion to modify a judgment, the motion must be brought into the record by bill of exceptions.

SAME.—*Erroneous Refusal to Grant Change of Venue.—How Question Saved.*—The erroneous refusal of a change of venue must be made the ground of a motion for a new trial or it will not be considered on appeal.

From the Shelby Circuit Court.

J. B. McFadden, for appellant.

K. M. Horn and *E. K. Adams*, for appellees.

McCABE, J.—This was a suit by the appellee William P. Stewart against the appellant, as principal, and the

appellee George W. Crum, as surety, on a promissory note, and seeking a foreclosure of a vendor's lien as against Scanlin.

The appellee Crum, as such surety, filed a cross-complaint against his codefendant, appellee Stewart, and appellant, Scanlin, showing that he had paid the debt and asking to be subrogated to the rights of Stewart.

Appellee Lux was admitted as a party defendant by the court, and a demurrer by Scanlin to the cross-complaint of Lux was overruled.

The assignment of errors calls in question the rulings of the court in overruling the demurrers to each of said cross-complaints.

At the request of Scanlin, the court made a special finding of the facts, and stated its conclusions of law thereon, to which the appellant excepted. It is wholly unimportant whether the rulings were correct or not in holding the cross-complaints good, as the same question again arises on the exceptions to the conclusions of law on the facts specially found, as has been often decided by this court. *State, ex rel.*, v. *Vogel*, 117 Ind. 188; *Martin* v. *Cauble*, 72 Ind. 67; *Douthit* v. *Douthit*, 133 Ind. 26; *Reddick* v. *Keesling*, 129 Ind. 128; *Ross* v. *Banta*, 34 N. E. Rep. 865.

The special finding states that "On January 25, 1890, said Scanlin, as principal, and the defendant George W. Crum, as surety, executed to the plaintiff (Stewart) their certain promissory note, payable sixty days thereafter, for $77.23, with interest at eight per cent. per annum from said date; that after the maturity of said note said Stewart instituted this action upon said note, and thereafter said surety, George W. Crum, fully paid and discharged said note and interest in the sum of $79.55, on June 15, 1890; that there is now due of principal and interest on said sum $83.27."

It is further found that on April 17, 1890, the cross-complainant John Lux, in a suit before a justice of the peace of Brandywine township, Shelby county, Indiana, the township of the residence of said Scanlin, recovered a judgment against said Scanlin, after more than three days proper service of summons, for the sum of $43.07, and costs taxed at $4.65, since which time said judgment has drawn interest at the rate of six per cent. per annum and is collectible without relief from valuation law; that on April 29, 1890, execution issued on said judgment, which execution was duly levied upon a certain building situate upon the west half of lot No. 19, on Washington street, in the town of Fairland, in said county; that said levy continued in force until December 18, 1890, when the plaintiff in said suit, John Lux, caused a writ of *venditioni exponas* to issue to the proper constable of said township, which was on said day placed in the hands of said constable, who now holds the same, together with the lien of such levy, not having sold said property; that the said house is the personal property of said Scanlin, erected by him upon said lot leased from one Totten for a term of years.

It is to be observed that these facts are all within the issues made by the pleadings.

The court stated, as conclusions of law: "That the cross-complainant George W. Crum should recover from the defendant Frank Scanlin the sum of $83.27, together with his costs herein; that the cross-complainant John Lux should maintain the lien of his alias execution as superior to any claim of the said cross-complainant Crum herein, and by reason of this proceeding upon said house; to which conclusions, the defendant Scanlin at the time excepts."

The judgment and decree followed the conclusions of law.

The objection urged here is against the sufficiency of the facts found to warrant the conclusions of law, in that the lien of the levy of Lux's execution was found to have continued in force from the time of its issue, viz, from April 29, 1890, until the 18th day of December, 1890, more than six months. It is contended that this shows an interval between the expiration of the life of the execution and the issue of the *vendi*. The statute provides that such executions shall be returnable in six months, but may be sooner returned if satisfied, or no property is found. 1 Burns' R. S. 1894, section 1577; R. S. 1881, section 1509.

The next section provides for issuing a *vendi* when property is levied on and remains unsold.

In such case the lien of the first execution is continued. Herman on Executions, p. 331, section 215.

The finding shows that the constable continued to hold possession of the property throughout the whole time. The levy of the execution was a presumptive satisfaction of the judgment, if the property is of sufficient value, until the levy is legally disposed of. *Stewart* v. *Nunemaker*, 2 Ind. 47; *Lindley* v. *Kelley*, 42 Ind. 294; *McIver* v. *Ballard*, 96 Ind. 76; *Richey* v. *Merritt*, 108 Ind. 347; *McCabe* v. *Goodwine*, 65 Ind. 288.

So long as the constable held this property under the execution, if of sufficient value to pay the judgment, it could hardly be said, under the foregoing authorities, that the lien of the execution was lost because the officer had failed to promptly return the execution at the exact time of the expiration of the six months, when the law made it returnable.

It has been held in Alabama that "Where executions have been regularly issued on a judgment, without the lapse of an entire term, the continuity of the lien is not

broken by the fact that the execution issued on the judgment, which was so irregular, informal and imperfect that it would have been quashed on motion, was returned by the order of the plaintiff, and, on the same day, another execution, curing the defects of the first, was issued." *Clark* v. *Spencer*, 75 Ala. 49.

The evidentiary facts may have shown that to have been the case here. The execution may have been informal and defective so that it would have been liable to be quashed and set aside. The plaintiff may have been unwilling to risk proceeding under it to sell property after it was levied on by virtue of such defective execution; and he may have ordered it returned to cure the defect in it. In that case the continuity of the lien would not be broken. These facts are evidentiary facts—mere evidence. The continuance of the levy was an inferential fact. The finding is not that the lien was continued, but that the levy was continued.

The inferential facts alone must be found in the special finding, and not the evidentiary facts or the mere evidence. The particular finding complained of is that the "levy continued in force from April 29, 1890, until December 18, 1890." The "levy" is a fact, an inferential fact, and not a conclusion of law, as appellant contends. And the "continuance" of the levy during the time specified is also a fact, an inferential fact, and not a conclusion of law. What is meant is that the levy was not abandoned, not released, but continued to subsist during that time.

Now, whatever evidentiary facts requisite there may have been, or may be required to establish that inferential fact, we must presume, were introduced in evidence. If they were not, the appellant's remedy was a motion for a new trial. We had as well hold that part of the finding to be a mere conclusion of law which finds that Lux recov-

ered a judgment against appellant before a justice of the peace, as to hold that a levy, or the continuance thereof, is a conclusion of law and not a fact.

As well contend that a complete transcript of the judgment before the justice must be set out in the special finding, as to contend that the special finding must set out each act done in making the levy, and each act done to continue the levy in existence. The continuity of the lien is another and a different matter, that is a conclusion of law from the facts found. That matter is properly stated in the conclusions of law. Counsel do not question the conclusions of law, if the facts have been properly found. Holding, as we have already indicated, that the levy and its continuance in force are inferential facts there was no error in overruling the exceptions to the conclusions of law.

Overruling appellant's motion to modify the judgment is assigned for error. This motion proceeds upon the idea that no lien is established in favor of Lux. It results from what we have already said, that the motion was correctly overruled. Besides, there is no bill of exceptions bringing into the record the motion to modify, pointing out objections to the form of the decree, which has been held necessary to present any question upon such a motion. *Adams* v. *La Rose*, 75 Ind. 474; *Bayless* v. *Glenn*, 72 Ind. 5; *Douglass* v. *State*, 72 Ind. 385; *Teal* v. *Spangler*, 72 Ind. 380.

It is also assigned for error that the circuit court erred in overruling appellant's motion, properly supported by affidavit, for a change of judge. It is wholly unnecessary to inquire into the propriety of that ruling as appellant is not in a position to avail himself of the ruling, even if it was erroneous. He did not move for a new trial. It has been often held that the erroneous refusal of a change of venue must be made the ground of

a motion for a new trial as a condition precedent to the right to a review of that question in this court. *Horton* v. *Wilson*, 25 Ind. 316; *Knarr* v. *Conaway*, 53 Ind. 120; *Berlin* v. *Oglesbee*, 65 Ind. 308; *Mannix* v. *State, ex rel.*, 115 Ind. 245 (251); *Bement* v. *May*, 135 Ind. 664.

No question is, therefore, presented to us by the record as to the ruling refusing a change of judge.

The judgment is affirmed.

HACKNEY, J., took no part in this decision.

Filed May 16, 1894.

ON PETITION FOR A REHEARING.

McCABE, J.—A very earnest petition for a rehearing is presented in this case, supported by two very extensive and elaborate briefs, on behalf of the appellant.

The points mainly relied on for a rehearing are: that we erred in holding that the ruling of the trial court in overruling a demurrer to the amended cross-complaint of appellee Crum was immaterial, because the same question was presented on the special finding of facts and conclusions of law thereon, and that the conclusions of law were not supported by the facts found. In other words it is contended that there were not facts enough found to warrant any relief under the cross-complaint, though all the facts alleged in the cross-complaint are found in the special finding; and that, we may remark, is a good ground for attacking the conclusion of law in favor of the cross-complainant. And that is the reason why the error, if any there was in overruling the demurrer to such cross-complaint, was harmless and immaterial. A correct declaration of the law arising upon the facts found would correct and cure any error in overruling the demurrer to the cross-complaint for want of sufficient facts. This rule is so well grounded in good reason, and sanctioned by such a long line of decisions

of this court cited in the original opinion, that we are not inclined to depart from it; nor is it true, as contended by appellant's learned counsel, that those cases are not in point. There is a large number of other cases in this court to the same effect.

The complaint sought a foreclosure of a vendor's lien on a building. The cross-complaint set up that Crum had secured a lien on the building by the levy of an execution issued on a judgment recovered before a justice of the peace; and the fact that appellant claims ought to have been, but was not, alleged in the cross-complaint, and ought to have been, but was not, found in the special finding, and without which the conclusion of law in Crum's favor was unsupported and erroneous, is that the justice who rendered the judgment had jurisdiction. In pleading a judgment or decision of a court or officer of special jurisdiction, it is sufficient to allege generally that the judgment was duly given or made. If the allegation be denied, the facts conferring jurisdiction must be proved on the trial. 1 R. S. 1894, section 372; R. S, 1881, section 369.

As to whether the cross-complaint stated facts sufficient without alleging that the justice by whom the judgment was rendered had jurisdiction, or that the judgment was duly given or made; and whether the special finding of facts was sufficient to warrant the conclusion of law in favor of the cross-complainant, without a finding that the justice had jurisdiction, might have made an interesting and important question for our consideration and decision had it been presented on the original hearing of the cause.

After carefully reading appellant's brief on the original hearing, of nearly thirty pages of closely written matter, we fail to find that the question of the jurisdiction of the justice of the peace was even hinted at there-

in. From this fact it is more than probable that no such question was made or thought of in the trial court. Appellant does not seem to have thought that there was anything in that point at the original hearing here, though he now urges it with two elaborate briefs citing a startling array of authority. But we must decline to consider them, because it is thoroughly settled by this court that it is too late to present a question for the first time in this court on a petition for a rehearing. *Yater* v. *Mullen*, 24 Ind. 277; *Heavenridge* v. *Mondy*, 34 Ind. 28; *Pittsburgh, etc., R. W. Co.* v. *Ruby*, 38 Ind. 294; *Graeter* v. *Williams*, 55 Ind. 461; *Union School Tp.* v. *First Nat'l Bank, etc.*, 102 Ind. 464.

The petition is, therefore, overruled.

Filed Oct. 17, 1894.

No. 16,838.

RADICAN *v.* BUCKLEY.

138 582
142 489
143 704

138 582
156 240

SUPREME COURT PRACTICE.—*Assessment of Damages.—Weight of Evidence.*—The Supreme Court can not pass upon the sufficiency or insufficiency of the damages assessed where to do so would require it to weigh conflicting evidence.

NUISANCE.—*Privy.—Injunction.*—The erection of a privy and vault within three and one-half feet of the dining room of an adjoining owner may be enjoined as a nuisance, without reference to the manner in which the vault is constructed or to the intention of the defendant to use disinfectants.

From the Fayette Circuit Court.

G. C. Florea and *L. L. Broaddus*, for appellant.

R. Conner and *H. L. Frost*, for appellee.

MCCABE, J.—Issues were formed upon appellant's complaint in two paragraphs, which were tried by the

court without a jury, resulting in a finding for appellant on the first paragraph of the complaint, assessing his damages at five cents, and a finding for appellee on the second paragraph; the court rendered judgment on the finding over appellant's motion for a new trial.

The only error assigned here that is insisted on by appellant is the action of the trial court in overruling the motion for a new trial as to each paragraph of the complaint severally.

The first paragraph of the complaint was to recover damages against appellee for the maintenance of a privy and privy vault on an adjoining lot to appellant's lot whereon his residence was situated, in the city of Connersville, in such a manner as to become a private nuisance to appellant on account of the foul stenches emitted therefrom, and other discomforts and injuries arising therefrom.

The evidence shows that the privy involved in the first paragraph was on the premises when appellee became the owner thereof, was situated within a foot or two of the line dividing appellant's from appellee's lot and 33 feet of the rear end of appellant's residence. Before the trial appellee had removed the privy building from the vault and filled it up in such a manner as to put an end to the foul stenches theretofore escaping therefrom. The appellee had only owned the premises complained of a few months before he abated the nuisance. While the evidence, as it seems to us, would have justified a much larger assessment of damages than the trial court made, yet the evidence is of such a character that we can not disturb the finding on the first paragraph of the complaint.

The question of the assessment of damages is one peculiarly within the exclusive province of a jury or the court trying the cause. This court can not disturb the

finding, because the damages assessed in this case are too small without weighing the evidence. This court has no power to weigh evidence or determine what the evidence establishes unless it is all one way. *Canada* v. *Curry*, 73 Ind. 246.

The second paragraph of the complaint sought to enjoin the erection of a new privy by appellee on his lot within three and one-half feet of appellant's dining-room and kitchen in his residence. When the trial took place, the new privy had been about completed. The undisputed facts established by the evidence under the second paragraph are, that appellant's dwelling house is a one story frame with a room numbered four, used as a dining-room and kitchen, and rooms two and three used as bed-rooms. The west door to the dining-room is the one most used by plaintiff as the main entrance to his house. The dining-room is only eighteen inches from the line between appellant's and appellee's lots, and only three and one-half feet from defendant's new privy. This privy is a three compartment frame building, eight feet high, with comb roof additional, located immediately north of and flush or even with the principal entrance door to the dining-room, with a door in the west end facing the same way appellant's main entrance door aforesaid faces, said privy being intended for the use of three tenement families occupying tenements on appellee's lot, and in actual use by them at the time of the trial. Said privy, as located, is in as plain view from appellant's front yard as his own house, and persons entering said privy for the purposes thereof can be plainly heard in appellant's house, especially in his dining-room and kitchen.

The vault of this privy is twelve feet deep, walled with stone and cemented, so as to allow no percolations, and consequently no absorption of the excrement, urinal fluids and gases by contact with the earth.

Appellant claimed, on the trial, that he intended to erect a lattice work on the north, east and west sides of the privy and plant vines around the same.

There was a difference of opinion among the expert witnesses as to whether the constant use of disinfectants would effectually prevent the stench, offensive odors and bad smells naturally arising from such a place.

It is contended, on behalf of appellee, that a privy is not a nuisance *per se*, and can not be enjoined any more than any lawful business calling or trade until it is carried on in an improper manner and its continuance has deprived the complaining party of the comfortable enjoyment of his property.

It is said, in Kerr Injunctions, p. 174, that "The court will not in general interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." See, also, Wood Law of Nuisance, section 796.

It is laid down by the author last referred to, section 579, that "Privies are regarded as *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet, if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of their property, by reason either of the noisome smells that arise therefrom, or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the water of a well or spring, they are nuisances in fact."

And the same author, at section 778, in discussing what is meant by irreparable injury, which will authorize the interposition of equity by way of injunction, says:

"By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, * * but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and * because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law."

The law, as applicable to the undisputed facts under the second paragraph of the complaint, is admirably stated by Chancellor Zabriskie, in *Cleveland* v. *Citizens' Gas Light Co.*, 5 C. E. Green (20 N. J. Eq.), 205.

The chancellor said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled, by poverty, to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and, when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property, as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is, what amounts to that discomfort from which the law will protect? The discomforts must be physical—not such as depend upon taste or imagination. But whatever is offensive physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance." See, also, to the same effect, *Ross* v. *Butler*, 4 C. E. Green (19 N. J. Eq.), 294; *Haggart* v. *Stehlin*, 137 Ind. 43.

As before observed, the evidence was conflicting as to whether the use of disinfectants constantly in the privy would effectually prevent the noisome smells and odors naturally arising from a privy vault in which human excrement and filth is kept confined. Appellee testified that he intended to use disinfectants in the privy, but that he had not used any in it yet.

Appellee's counsel quote in their brief the familiar rule from Cooley Torts, p. *600, running through all the authorities, and attempts to apply the same to the facts under the second paragraph of the complaint in support of their contention. That rule is that "It must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to the elegant and dainty modes and habits of living, but according to the plain, sober and simple notions among the English people."

And, from *Huckenstine's Appeal*, 70 Pa. St., p. 102, they quote: "And more than this, it (the court) must look at the customs of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place wherein it is called upon to exercise the power."

The application of that rule in this case is against appellee's interest.

Appellant's objection to the maintenance of a privy within three and one-half feet of his dining-room and kitchen, with one door of the privy opening flush or even with the entrance door to such dining-room, that being the main entrance door to his house, in short, his objection to the maintenance of a privy almost in his dining-room door, is no frivolous complaint, is not founded on an elegant and dainty mode and habit of living, but is founded upon the plain, sober and simple notions and customs of our people.

No custom or notion of our people is more universal than that which requires privies to be built in the background of the premises, as far as possible from the house, the place designed for human habitation, especially in towns and cities like Connersville, where no sewerage is provided, and where the human excrement deposited therein must remain in the vault, giving off its noxious exhalations and offensive smells.

The only conceivable reason for building appellee's privy within three and one-half feet of appellant's kitchen and dining-room, consistent with the absence of rank malice in appellee, was to get it as far away as possible from each of the three tenement houses he had crowded onto his one lot. There was room enough on his lot to have placed the privy much farther from appellant's residence without getting it so uncomfortably near to any of the tenement houses on appellee's lot.

In that he showed that for himself and his tenants he had no faith in the use of disinfectants to deodorize a privy, which he stated in his testimony he intended to use for appellant's benefit, so as to make appellant's life tolerable with a privy large enough to accomodate three families, in his dining-room door, or practically so.

We do not think that the law compels a man to submit to a thing which is necessarily a nuisance, merely because the wrong-doer promises to do all he can to counteract the evil effects of such nuisance.

It was held, in *Wahle* v. *Reinbach*, 76 Ill. 322, that a privy, built on an adjoining lot within eight feet of the complainant's residence, was a nuisance in fact. The court, in that case, speaking by Justice Schofield, at p. 327, said: "Manifestly, no remedy in an action at law would be adequate in a case like the present. Upon what basis could the damages be estimated for the sickness or discomfort caused by inhaling the unwholesome

vapors, drinking the impure water, and enduring the foul stenches originating from a structure of the description and relative location complained of? And to say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be but little better than a mockery of justice to him whose residence is affected by it."

In *Miley* v. *A'Hearn* (Ky.), 18 S. W. Rep. 529, it was held that "Injunction will lie to prevent an adjoining land-owner from building a privy within ten feet of plaintiff's well, and thirteen feet of the dining-room and family bed-room, where she and her two daughters * eat and sleep."

And, it was further said in that case, that "The strongest testimony for the appellant is that, while it is possible to make the vault of the privy water-tight, and to destroy the bad odors arising from it by the constant use of disinfectants, yet there is always danger in these respects. The walls of the vault are likely to crack, and whether disinfectants will have the desired effect depends to some extent upon the state of the atmosphere, and other conditions."

We are of opinion that the finding of the court as to the second paragraph of the complaint was contrary to law.

The judgment is reversed as to the second paragraph of the complaint; cause remanded, with instructions to grant a new trial as to said second paragraph; and the judgment is affirmed as to the first paragraph of the complaint.

Filed Sept. 20, 1894.

No. 16,831.

MYERS *v.* THE W. C. DEPAUW COMPANY.

MASTER AND SERVANT.—*Assumption of Ordinary Risks of Service.—Age and Understanding of Servant.—Presumption.*—An employe of mature age and sufficient understanding will be presumed to have assumed all the ordinary risks attending the service, and where such age and understanding are wanting, such fact should be disclosed by the complaint, otherwise he will be presumed to have attained to such understanding and to be of such age.

SAME.—*Ordinary Risks.—Glass Manufactory.*—It is necessarily one of the natural incidents of the handling of glass, in the processes of its manufacture, that it will be broken without violence from, or the fault of, those who handle it.

SAME.—*Dangerous Service.—Assumed Risks.—Care by Servant.*—The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. The servant is required to exercise his faculties to a degree in proportion to such dangers.

SAME.—*Assumed Risk.—Glass Manufactory.—Failure to Use Gauntlets.*—If an employe in a glass manufactory knew of the custom of employes to wear leather gauntlets, and with such knowledge he went about his service without them, and without any promise by the master to supply them, the risk became one of the assumed risks of the service, and liability therefor was waived, and the same would be true even if it were the duty of the master to furnish the gauntlets instead of having been a mere custom.

From the Floyd Circuit Court.

L. A. Douglass and *W. D. Marshall*, for appellant.

A. Dowling, for appellee.

HACKNEY, C. J.—The record in this case presents the question of the sufficiency of each of two paragraphs of complaint.

The first alleged the appellant's employment for the appellee in carrying plate glass to the grinding tables in appellee's plate glass factory; that while so engaged a glass broke and one of the pieces, in falling, struck his wrist and inflicted the injury complained of. The charge

of negligence against the appellee was in failing to notify the appellant of the dangers of the employment, and in neglecting to supply him with leather gauntlets for the protection of his arms and wrists. It was alleged, as the basis for the conclusion of negligence in failing to supply gauntlets, that it was the custom of the appellee to furnish them to, and at the expense of, employes.

The second paragraph alleged that the service was dangerous, and one of its hazards was in the liability of the glass to break from "causes within itself"; that the appellant was ignorant of such hazard and inexperienced in such service; that the appellee knew of the hazard and of the appellant's ignorance and inexperience, and negligently failed to advise the appellant of the hazard and to instruct him in the service; that the glass carried by the appellant broke, from "causes within itself," and, in falling, cut his wrist.

Appellant's counsel concede that "It is the settled doctrine of the law, that an employe, when of mature age and of sufficient understanding to apprehend the dangers of the service, must be presumed to take all the ordinary risks pertaining thereto, in entering upon his employment." Of the proposition thus conceded there can be no doubt, and if the appellant was not "of mature age and of sufficient understanding to apprehend the dangers of the service" the fact was not disclosed by the complaint. He must, therefore, be presumed to have assumed all of the ordinary risks attending the service. Was the injury sustained the result of any of such risks? It is a matter of common observation that glass is a fragile substance, and that its broken edges are sharp and dangerous. It is necessarily one of the natural incidents of the handling of glass, in the processes of its manufacture, that it will be broken without violence from, or the fault of, those who so handle it.

The complaint in neither paragraph alleges latent imperfections in the plate which caused the appellant's injuries, and if it was intended by the phrase, "from causes within itself," to suggest a latent defect or imperfection, the facts are not so pleaded as to disclose that such latent imperfection was the result of negligence on the part of the appellee.

We do not find that the phrase "from causes within itself," necessarily implies causes not perceptible to one of ordinary observation. Glass being transparent, its ordinary imperfections are patent. In the present case the character of the imperfection, if, indeed, it can be said that an imperfection was alleged, was not disclosed, and whether one of which the appellant should have received notice from the appellee, namely, a latent imperfection, we are not advised.

Those who accept employment involving hazards are not only presumed to be acquainted with the ordinary dangers thereof, but are required to go about the service exercising their faculties to a reasonable degree, in proportion to such dangers. The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. Here the danger resulting in injury was not shown to have been enhanced by any act or omission of the appellee, and was not, therefore, an extraordinary danger as connected with the particular service. Upon the question of the appellee's failure to give warning of the danger, therefore, the complaint is wholly insufficient.

As to the allegation of the appellee's failure to advise the appellant of the custom of supplying to employes the leather gauntlets, the complaint finds no support. It does not appear that such gauntlets were appliances which, by the custom of glass manufacturers, were re-

quired to be supplied to servants by the master, nor was it alleged that servants were required, by any rule or custom connected with the service generally, or with that of the appellee specially, to wear such gauntlets. It was simply alleged that the appellee's custom was to supply them at the expense of the servant. A knowledge by the appellant of such custom is denied, but it does not appear that he had no knowledge that employes wore such gauntlets for the protection of their wrists. If we may presume that he knew of the custom of employes to so wear them, and that with such knowledge he went about his service without them, and without any promise by the master to supply them, the risk became one of the assumed risks of the service, and, under the repeated decisions of the courts, liability was waived. This conclusion would follow even if we were to presume that it was a duty of the appellee to supply them instead of its having been a mere custom. But we doubt the application of the rule requiring the master to furnish safe machinery and appliances. The gauntlets were no more than the shoes or other apparel of the servant; no more than the apron of the blacksmith.

We conclude that the circuit court did not err in sustaining the appellee's demurrer to the complaint, and the judgment is therefore affirmed.

Filed Sept. 18, 1894.

138 594
139 890

138 594
142 319

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146 623

138 594
163 118

No. 16,871.

WRIGHT, ADMINISTRATRIX, ET AL. *v.* FULTZ ET AL.

PLEADING.—*Answer.—Verification.—Action to Establish Lost Will.*—In an action by devisees to establish a lost will, an answer of general denial to be available, need not be verified.

WILL.—*Lost.—Action to Establish.—Not Triable by Jury.*—In probate matters, it is only where the statute expressly gives the right of trial by jury, that such right may be demanded. Such a right does not exist in an action to establish a lost will.

EVIDENCE.—*Admissibility, When no Question as to is Saved.*—No question as to the admissibility of evidence is saved, where the evidence is not in the record, and no question is shown to have been put to the witness, and no statement is made as to what the witness will testify to.

From the Washington Circuit Court.

E. B. Stephenson and *W. P. Adkinson*, for appellants.

D. M. Alspaugh, J. C. Lawler, J. A. Zaring and *M. B. Hottel*, for appellees.

DAILEY, J.—This was a proceeding by the appellants to establish an alleged lost will. There was a trial by the court, resulting in a finding and judgment for the defendants, from which this appeal is taken. The appellants contend that the court erred:

First. In refusing to reject the general denial filed by the defendants below to the complaint.

Second. In overruling the appellants' demand for a jury.

Third. In excluding the evidence of the witness Levi C. Wright.

Fourth. In overruling their motion for a new trial.

In support of the first specification, the appellants' counsel barely suggest that the answer in this case to be available should have been verified. It seems absurd to assume that a party should be required to file a plea of *non est factum* to an alleged will, when it is not con-

tended that he had anything to do with its execution. The issue to be tried in an action to establish a lost will is, "did she devise or not?" and is framed by the court, which in matters of probate usually hears the evidence, and determines the controversy. 13 Am. and Eng. Ency. of Law, 1142. It is clear that the court did not err in overruling appellants' motion to reject the answer. Prior to the enactment of 1852, all cases for the establishment of lost wills were cognizable only in courts of chancery, and a jury could not be called, and the law in this respect has not been changed. Section 78 of the Revised Statutes of 1843, pages 499–500, reads that "Whenever any will shall have been lost or destroyed by accident or design, and the same shall have been established by the proper proceedings, in a court of chancery, the decree of such court establishing such will shall be recorded by the clerk of the proper probate court, etc." Our present statute is an almost literal copy of section 78, *supra*, except the words "proper court" are substituted for the phrase "courts of chancery." The R. S. 1881, section 409 (Burns' R. S. 1894, volume 1, section 412), provides that: "Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable." It is only where the statute expressly gives the right of trial by jury, in this class of cases, that such right may be demanded. *Dower* v. *Seeds*, 28 W. Va. 113; *Jacques* v. *Horton*, 76 Ala. 238. The provision of article 1, section 65 of the constitution of this State, that "In all civil cases, the right of trial by jury shall remain inviolate" has reference to what were deemed civil actions at common law. *Allen* v. *Anderson*, 57 Ind. 388; *McMahan* v. *Work*, 72 Ind. 19.

There is no contention that actions to contest wills are triable only by the court. It is conceded that the statute expressly authorizes a jury trial in such cases. But it is insisted that the establishing of a lost will is essentially different from an action to probate or contest a will, because the contents of a lost will must be first established before it can be admitted to probate. It is true that in a proceeding to contest the probate of a will, the execution thereof may be contested also, but the case before us presents no such question under the issues formed. Besides, the complaint contains another feature of exclusively equitable jurisdiction. It asks that the administrator of the decedent's estate be restrained from further proceedings to the injury of the devisees. Restraining orders are issued by the court, and are purely equitable. A party who invokes the aid of a court of equity in such matters can not avail himself of a trial by jury.

The third assignment of error presents no question for our consideration. The evidence is not in the record. No question is shown to have been put to the witness Wright. No averment is made that the witness would testify to any fact, and nothing is saved by the appellants. When the court refuses to admit the testimony of a witness, a question should be asked, and the particular facts expected to be proven by the witness stated to the court. *Toledo, etc., R. W. Co.* v. *Goddard*, 25 Ind. 185; *Lewis* v. *Lewis*, 30 Ind. 257; *Baltimore, etc., R. R. Co.* v. *Lansing*, 52 Ind. 229; *First Nat'l Bank, etc.*, v. *Colter*, 61 Ind. 153; *Farman* v. *Lauman*,73 Ind. 568; *Higham* v. *Vanosdol*, 101 Ind. 160; *Beard* v. *Lofton*, 102 Ind. 408; *Ralston* v. *Moore*, 105 Ind. 243; *Ford* v. *Ford*, 110 Ind. 89; *Kern* v. *Bridwell*, 119 Ind. 226.

The judgment below is in all things affirmed.

Filed Sept. 26, 1894.

No. 16,908.

PETITT *v.* PETITT ET AL.

JUDGMENT.—*Objection to Form of.—Question, How Saved.—Supreme Court Practice.*—An objection to the form of a judgment can not be considered by this court, unless the objection was made at the time the judgment was entered, and a motion was made or other appropriate steps taken to modify and correct it.

From the Fountain Circuit Court.

J. A. Lindley and *O. P. Lewis*, for appellant.

C. M. McCabe, *J. Bingham* and *L. P. Miller*, for appellees.

DAILEY, J.—This was an action instituted by the appellee Milton Petitt against the appellant, Nettie M. Petitt, for a divorce.

She appeared to the proceeding and filed her cross-complaint, making Marshall Petitt a co-defendant with said Milton Petitt, and specified therein certain causes for divorce; she also alleged that the appellees Milton Petitt and his son Marshall, in contemplation of a suit for divorce against appellant, entered into a fraudulent conspiracy to cheat her out of any judgment for alimony she might obtain, and pursuant to said conspiracy the father conveyed to the son all his farm lands without any consideration whatever, and suffered a false, fictitious, and fraudulent judgment to be taken against him by the son, upon a promissory note which was without any consideration whatever, except to cheat, hinder and delay the appellant in the collection of any judgment for alimony she might obtain in any proceedings for divorce he might institute against her.

Appellant prayed that the conveyances might be set aside as fraudulent against her, and that any judgment

for alimony she might obtain be decreed a prior and superior lien against the property described in said conveyances, and also against the said judgment. Each of the appellees filed a separate general denial. The cause was submitted to the court for trial. After hearing the evidence, it granted so much of the prayer of the cross-complaint as sought a divorce and alimony, but refused to set aside the conveyances and judgment and to decree them inferior to her judgment for alimony. It also made a finding in favor of the appellee, Marshall Petitt. Appellant then filed her motion for a new trial, which was overruled, to which she excepted, and judgment was duly rendered in favor of appellee, Marshall Petitt, for costs. From this judgment she prosecutes her appeal. The only error assigned is that the court erred in overruling appellant's motion for a new trial.

Four separate reasons are stated in the motion therefor. Of these appellees' counsel have discussed the first and second, and expressly waived the third and fourth. The reasons thus remaining for the consideration of the court are as follows:

"1st. The court erred in refusing to declare and decree to be fraudulent as against cross-complainant the judgment mentioned, referred to and alleged to be fraudulent as against her in the second paragraph of cross-complaint, to wit: The judgment rendered in favor of the defendant Marshall Petitt against the defendant Milton Petitt, as prayed for by said cross-complainant in her second paragraph of cross-complaint as aforesaid; and,

"2d. The court erred in refusing to declare and decree the judgment for alimony rendered in said cause in favor of the cross-complainant against the said Milton Petitt a prior and specific lien upon the property of said Milton Petitt as against the general lien of the defendant Marshall Peittt, against the said Milton Petitt, to wit: the

judgment mentioned and referred to in the second paragraph of cross-complaint as having been rendered in favor of the said defendant Marshall Petitt, against the said defendant Milton Petitt, as prayed for by said cros-complainant in her said second paragraph of cross-complaint."

The appellant's counsel summarize the first of the alleged reasons by saying it is "that the court erred in refusing to grant the prayer of her cross-complaint." If this summary were strictly correct, it is not provided for by statute as a cause for a new trial. It does not possess the force of the sixth statutory ground, calling in question the correctness of the finding of the court upon the evidence.

The second specification, almost identical in character, is treated as if it performed the office of a motion to amend, modify, or correct the judgment. Neither of them controverts the correctness of the finding in appellee Marshall Petitt's favor, but says that notwithstanding the finding the court erred in refusing to render judgment in a certain manner and form. It is well settled that an objection to the form of the judgment can not be considered by this court unless the objection was made at the time the judgment was entered, and a motion was made, or other appropriate step taken, to modify and correct it. *Martin, Sr.*, v. *Martin*, 74 Ind. 207; *Smith* v. *Kyler*, 74 Ind. 575; *Floore* v. *Steigelmayer*, 76 Ind. 479; *Brownlee, Admr.*, v. *Hare*, 64 Ind. 311; *Rosenzweig* v. *Frazer*, 82 Ind. 342; *Rodefer* v. *Fletcher*, 89 Ind. 563.

In the case at bar, the judgment was not rendered until after the motion for a new trial was disposed of, and no objection was raised in the court below as to its form. *Beeson* v. *Howard*, 44 Ind. 413.

The principles of law applicable to a record in this

condition are so firmly established by an unbroken line of decisions that we can not go beyond this point without attempting to decide matters not presented for our consideration.

As we find no available error in the record, the judgment is affirmed, at the cost of the appellant.

McCabe, J., took no part in this decision.

Filed Sept. 27, 1894.

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No. 16,773.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company *v.* Keely, by His Next Friend.

Negligence.—*Of Parents.—Personal Injury of Child.—Sui Juris.—Complaint, Necessary Allegations.*—It is not negligence in parents to let a boy eleven years of age attend school, where to do so the boy must cross a railroad in going to and from school; and a complaint in an action by such boy for personal injuries sustained while crossing the railroad, need not allege that his parents were free from negligence, but it is sufficient to show his own freedom from contributory negligence, the boy being *sui juris*.

Same.—*Of Railroad Company.—At Street Crossing.—Violation of City Ordinance.—Suddenly Starting Train, Standing across Street, without Warning.—Custom.*—It is negligence in a railroad company to obstruct a street crossing with its train to the interruption of public travel for fifteen minutes, in violation of a city ordinance; and it was also negligence, after allowing the train to stand still across the street and sidewalk, the engineer having left his usual post on the engine, to then start back suddenly without warning, where persons were waiting on either side of the crossing, and had waited so long, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point.

Contributory Negligence.—*Attempt of Eleven Year Old Boy to Pass Through a Train Standing across Street.—Appearance of Safety Created by Railroad Company.*—Where a school boy, eleven years of age, had stood on the sidewalk five or six minutes in a heavy, cold rain, waiting for a chance to get across the railroad, on his way home at noon, the roadway at that point being very deep with mud, the

train having come to a standstill, and the engineer having left his usual post on the engine, it was not negligence for the boy, by permission and direction of the flagman at such crossing, to attempt to pass through the train at the coupling of two cars, as he had often done before in safety, at the direction of the flagman, the boy's action being justified by the appearance of safety created by the railroad company.

From the Marion Circuit Court.

B. K. Elliott, W. F. Elliott, J. T. Dye, A. Baker and *E. Daniels*, for appellant.

W. V. Rooker, for appellee.

HOWARD, C. J.—This was an action for personal injuries, brought by the appellee against the appellant.

The material allegations of the complaint are: That on the 9th day of November, 1891, the appellant company was operating a line of railroad extending along Louisiana street and across New Jersey street, in the city of Indianapolis; that on said day the appellee was, and now is, an infant eleven years of age, a pupil attending the public schools of said city, and residing with his parents on the west side of said New Jersey street, and north of said line of railroad; that the public school at which he was a pupil was situate on New Jersey street, and south of said line of railroad; that the roadway of New Jersey street at and near the railway tracks was obstructed and impassable to appellee by reason of the accumulation of filth thereon, and of debris from certain public works and improvements thereabouts then in progress; that on said day he was on his way homeward to his dinner at the noon hour of intermission of said school, and had passed northward along the west sidewalk of New Jersey street until he arrived at the point of crossing the railroad tracks, where he found the appellant was wholly obstructing said street intersection with a locomotive engine and train of

cars which the appellant's servants were moving to and fro along said Louisiana street tracks, and across New Jersey street, in the act of switching said cars, and distributing the same upon the yard tracks on the west of the New Jersey street intersection; that it was then and there a violation of an ordinance of said city to obstruct said street intersection with said cars or locomotive engine for more than three minutes at any one time, except in case of accident; that on said occasion there was no accident, but said obstruction was maintained for a long time, to wit, fifteen minutes, by reason of the moving to and fro of said train for the purposes and in the manner aforesaid, so that the further progress of appellee was then and there delayed for fifteen minutes; that during all the time that appellee was so halted and delayed on the south side of said tracks, a cold and heavy rain was falling, and the appellee had begun to suffer and was suffering from the exposure to which he was subjected; that after appellee had been so delayed for fifteen minutes the appellant's servants halted said train so that an aperture or opening of coupling in said train, as it was then connected together, was directly in front of the sidewalk, where appellee was so delayed; that upon halting said train, the engineer thereon abandoned his usual post on the locomotive engine, and, apparently to appellee, went away; that appellant then and there maintained a flagman, whose duty it was to direct persons as to their crossing said tracks; that appellant well knew of appellee's situation; that appellee being in great haste, and in fear of punishment if further delayed, and being in distress from said exposure, and believing it was the duty of the flagman to direct him across said tracks, as he had under like circumstances previously done and assisted to do, and relying upon the superior wisdom, experience and discretion of said flagman, and

of the apparent absence of said engineer, as appellant well knew, appellee, pursuant to the recommendation and direction of said flagman, then and there given, undertook, in a careful manner, to cross the said tracks through said coupling aperture and opening; and, while he was so doing, appellant's servants, though they well knew appellee's situation, negligently, carelessly and wrongfully set the said locomotive engine and cars in motion, by reason of which, and without any fault on his part, the appellee's left foot was caught, crushed and mangled, and he has suffered great bodily pain and mental anguish, and is permanently disfigured, crippled and disabled, all to his damage, etc.

On the overruling of a demurrer to this complaint, the appellant answered in general denial, and the cause was submitted to a jury for trial.

The evidence on the part of the plaintiff, appellee, having been concluded, counsel for the defendant, appellant, moved the court for a nonsuit, and asked the court to instruct the jury to return a verdict for the defendant on the evidence of the plaintiff. This motion was argued in the absence of the jury, and, on the reassembling of the jury, was overruled by the court.

Thereupon the defendant filed its demurrer to the evidence introduced by the plaintiff, in which demurrer the plaintiff joined. Upon the demurrer so filed to the evidence by the defendant, and the joinder therein by the plaintiff, the court delivered its instructions to the jury, and directed a verdict assessing damages only; and after argument by counsel, the jury returned an assessment of damages in the sum of $4,000. The court then overruled the demurrer to the evidence, and rendered judgment on the verdict.

The errors assigned on the appeal are:

1. The overruling of the demurrer to the complaint.

2. The overruling of the motion to instruct the jury to return a verdict for the defendant.

3. The overruling of the demurrer to the evidence.

4. The rendering of judgment on the verdict.

Counsel for appellant suggest, rather than argue, that the complaint is deficient.

The case of *Lake Shore, etc., R. W. Co.* v. *Pinchin*, 112 Ind. 592, is cited to prove that one who attempts to pass between the coupled cars of a freight train standing temporarily across a street, and either knows, or might know, that the train is likely to move at any moment, is guilty of contributory negligence. But in the case before us it does not appear, from the complaint, that the appellee either knew or might know, by the use of his faculties, that the train was likely to move at any moment. On the contrary, after standing in the rain for fifteen minutes, waiting while the train moved to and fro across the street, he perceived that the train came to a halt with an aperture or opening of coupling directly in front of the sidewalk where appellee stood. At the same time appellee saw the engineer leave his post on the engine. The flagman also, placed there to aid travelers to pass the track in safety, directed him to cross through the opening. This the flagman had, under like circumstances, previously done, and appellee relied upon the experience and discretion of the flagman, as well as upon the abandonment of his station by the engineer, and so undertook the passage in confidence. The two cases are quite dissimilar.

It is also intimated, though not seriously urged, that the complaint should have alleged due care on the part of the parents of the appellee.

In *Pittsburgh, etc., R. W. Co.* v. *Vining's Admr.*, 27 Ind. 513, it was correctly said that: "The unnecessary exposure to known danger of a child incapable of exer-

cising the care and judgment of mature years, is in itself an act of negligence on the part of the parent."

The child, in that case, was seven years of age, and the court accordingly held that the allegation in the complaint that the parents were without fault, was proper and sufficient.

A like ruling was made in *Lafayette, etc., R. R. Co.* v. *Huffman*, 28 Ind. 287, where the child was but five years old, and it was held that the complaint should have alleged due care on the part of the parents.

In the case which we are considering, the appellee was eleven years of age, and was a pupil in attendance upon a school upon the same street upon which his parents lived, and going to and from which he crossed this track many times a day.

In *Downs, etc.*, v. *New York Central R. R. Co.*, 47 N. Y. 83, a boy twelve years of age, traveling upon a train with his mother, and not finding room in the car with her, was allowed by her to go into another car, and afterwards, in leaving the other car, he was injured; and it was held not to have been negligence on the part of the mother to have let such a boy go from her into the other car.

The appellee in this case is suing for his own injury. He was himself capable of going to school across the railroad, and his parents are not in the case, nor is it necessary that they should be. Besides, the facts alleged show that there could be no negligence on their part. They were not at fault for letting such a boy attend school on the same street as their home, even if he had to cross a railroad when coming home to dinner. In such a case it is sufficient to aver, as the complaint here does, that the party injured was himself guilty of no negligence which contributed to the injury. *Louisville, etc., R. W. Co.* v. *Boland*, 53 Ind. 398.

Contributory fault need not be denied when the facts stated show that there was no such fault. *Duffy* v. *Howard*, 77 Ind. 182; *Indiana Mfg. Co.* v. *Millican, Admr.*, 87 Ind. 87.

In their argument against the overruling of the demurrer to the evidence, counsel for appellant contend that appellee was guilty of contributory negligence, and that appellant was not guilty of negligence, as shown by the evidence.

The evidence shows that the appellee was on his way home to his dinner, from school, the school being south of the railroad tracks, and his home north, both on the same street; that he arrived at the tracks about ten or fifteen minutes after noon, and found a train standing over the crossing; that it was raining very hard; that he stood waiting on the sidewalk five or six minutes; that the roadway at that point was ankle deep with mud and filth caused by work going on near by, the building of a viaduct; that the train moved east at first, part of a square, not clearing the crossing, then backed up and stood still four or five minutes; that the engineer left his place on the engine; that there was a flagman at the crossing, and when the engineer left his place appellee asked the flagman if he would have time to go through, and the flagman replied, "yes, plenty of time. Skip through," and appellee started as directed; that he could not put his foot on the bumper, it was too high, and he put it in the link, and as he raised the other foot the cars started up and mashed his foot. The appellee had several times before, when going to or from school, and the crossing was blocked by a train, been directed by the flagman to go through, and had always gone through all right.

The court held this and other corroborating evidence sufficient to show that appellee was without fault; and

we can not see that there was any error in such holding. Appellee had stood a long time in the November rain, patiently waiting for a passage home to his dinner; he had often before, when on his way from school, and the train was on the crossing, by direction of the flagman, gone safely through. It was with him not a question of danger but one of time; the train was standing for several minutes, the engineer had left his post, and the flagman had told him there was plenty of time, to skip through. Having waited so long in patience, taken all precautions, and been directed by the man placed there in authority, and whose discretion and experience were known to appellee from like previous occasions, he could not, as we think, be charged with negligence in acting as he did. An appearance of safety was created by the the train being brought to a halt, the engineer away from his place, and the flagman's direction to go through, coupled with former crossings in safety. Such appearance of safety, created by the railroad company, justified the appellee's action. *Chicago, etc., R. R. Co.* v. *Boggs*, 101 Ind. 522, at p. 527, and authorities there cited.

Much of what has been said as to absence of negligence on the part of appellee is applicable also as showing negligence on the part of appellant. It was, besides, negligent in the company to occupy the street crossing to the interruption of public travel on a thoroughfare for so long a time as fifteen minutes; and after standing still across the street and sidewalk, and the engineer leaving his post, then to start back suddenly without warning, with persons waiting so long on either side, as shown in the evidence, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point. This evidence and the witnesses were all before the court,

and the court hearing it deemed the evidence sufficient to show negligence on the part of appellant.

To us the ruling seems reasonable. The engineer who kept his train so long upon the crossing, and at length stood it still over the street and sidewalk, himself also leaving his post upon the engine, could not but know the public character of the street and observe the persons on each side, including school children, waiting in the cold, heavy rain, impatient at delay at the dinner hour; nor could he avoid perceiving the deep mud-covered street. Ought he to return suddenly to the engine, and, without a note or word of warning, push back his train amongst those men, women and children, careless of danger to them?

We have said little of the youth of appellee, but, as said by ELLIOTT, J., in *Binford* v. *Johnston*, 82 Ind. 426, "The age of the child is always to be taken into account."

And, in the same case, Lord Ellenborough, in *Townsend* v. *Wathen*, 9 East, 277, is quoted, that "Every man must be taken to contemplate the probable consequences of the act he does."

The carelessness of the flagman is conceded; but we think it also clear that the trainmen proper were likewise guilty of negligence.

The demurrer to the evidence was properly everruled, and the judment is affirmed.

Filed May 11, 1894; petition for rehearing withdrawn Sept. 20, 1894.

No. 16,763.

Board of Commissioners of Parke County *v.* Wagner, Administrator.

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Negligence.—*County.—Defective Bridge.*—The rule that counties are liable for injuries caused by defects in bridges which they are bound to keep safe, but negligently fail to do so, is the law of this State, although there is no statute creating such liability.

Bridge.—*Complaint.—Motion to Make More Specific.*—Where a complaint alleges an injury while crossing "a bridge over a natural watercourse," and alleges that the bridge was one which it was the duty of the county to maintain, and that it constituted part of a public highway, a motion to make the pleading more specific, by setting out more particularly the character, size and description of the watercourse, and the character, size and position of the bridge over the same, may be properly overruled.

Same.—*Duty of County to Maintain Bridges.—Personal Injury.*—Under section 2892, R. S. 1881, the board of county commissioners is charged with the duty of causing all bridges in the county to be kept in repair, whether they cross natural or artificial watercourses, and for a breach of this duty, resulting in injury to a traveler, without contributory fault, the county is liable.

Same.—*Character of Bridge.*—No matter by whom, when or for what purpose built, or whether temporary or permanent, as soon as it becomes the duty of the board of commissioners to maintain the bridge, that duty permits no other consideration than the reasonable safety of the persons crossing it in a proper manner.

Watercourse.—*Definition.*—A watercourse, in its most general sense, is a course or channel in which water flows. In its legal sense, it consists of bed, banks and water, a living stream, that is, a permanent or continuous stream, confined in a channel, but not necessarily flowing all the time, as the question does not depend upon the length of time water flows as compared with the time the channel is dry.

Same.—*Instructions Defining Watercourse.*—For instructions defining a watercourse held to have been properly given, and for instructions held to have been properly refused, see opinion.

Verdict.—*General.—When Prevails Against Answers to Interrogatories.*—A general verdict will prevail against answers to interrogatories, unless the latter, being themselves free from conflict, are in absolute conflict with the verdict.

The Board of Commissioners of Parke County *v.* Wagner, Admr.

BILL OF EXCEPTIONS.—*Omission of Some Evidence.—Questions Arising Upon Evidence.—Practice.*—Where the bill of exceptions affirmatively shows that evidence was introduced which is omitted from the transcript, the statement of the bill that it contains "all the evidence given in the cause," will not prevail, and no question arising upon the evidence will be considered.

From the Vermillion Circuit Court.

D. H. Maxwell, H. Maxwell, M. G. Rhoads and *B. S. Aikman*, for appellant.

C. McNutt, J. G. McNutt, J. Jump, J. E. Lamb, J. C. Davis, H. H. Conley and *J. C. Sawyer*, for appellee.

HACKNEY, C. J.—In the circuit court the appellee recovered a judgment against the appellant for forty-five hundred dollars. The complaint alleged that the appellee's decedent, William Wagner, while attempting to cross "a bridge over a natural water course," in Parke county, was thrown from his buggy and received injuries from which he died; that he was so thrown from his buggy, by reason of the negligence of the appellant in permitting said bridge to become and remain in a dangerous condition, the boards of the floor thereof being loose and worn, and when the decedent's horse went upon the bridge one of said boards "gave way and tipped up, striking said horse, which was of ordinary gentleness, thereby hurting and greatly frightening it so that it became frantic and beyond control," and ran away, causing the injuries as aforesaid. It was further alleged that said bridge constituted a part of a public highway of said county leading from Numa to Clinton Locks.

The appellant assigns as error the action of the trial court in overruling a demurrer to the complaint, and in discussion, while conceding that the rule is otherwise in this State, urges that there is no liability by counties for such negligence, owing to the absence of any statute creating such liability. While agreeing with counsel in

their statement of the rule, we are unable to recede from the position of this State upon the question, since that position has been so often assumed that it has become a part of "the law of the land," and if hereafter departed from, it must be by legislative direction. *Cones* v. *Board, etc.*, 137 Ind. 404; *Board, etc.*, v. *Daily*, 132 Ind. 73; *Board, etc.*, v. *Chipps, Admr.*, 131 Ind. 56; *Morris* v. *Board, etc.*, 131 Ind. 285; *Smith* v. *Board, etc.*, 131 Ind. 116; *Board, etc.*, v. *Rickel*, 106 Ind. 501.

It is next insisted that the appellant's motion to make the complaint more specific was erroneously overruled. The motion was "That the plaintiff be required to set out more particularly the character, size and description of the natural watercourse mentioned in said complaint, and the character, size and position of the bridge over the same."

The argument in support of the motion is that notice should have been given by the complaint as to the particular watercourse and bridge in question to enable the defense to prepare to meet the true issue. If the motion had sought the location of the highway where it crossed the watercourse spanned by the bridge, the desired notice might have been obtained, since the location thereof, as "leading from Numa to Clinton Locks," in said county, was not very definite. But the character, size and description of the watercourse and bridge were both difficult and unnecessary to allege, and most certainly so when the bridge was alleged to be one which it was the duty of the county to maintain. If the real object of the motion was to enable the appellant to have tested the sufficiency of the complaint upon the special questions of the character of the watercourse and of the bridge, the motion sought evidence and not statements of fact.

There was no error in the ruling complained of.

The appellant further complains of the action of the

lower court in overruling its motion for judgment upon the answers of the jury to special interrogatories, notwithstanding the general verdict for the appellee. The interrogatories and answers were as follows:

"1. Does water flow under the alleged bridge the greater portion of the time? Ans. No; but it does in the channel above and near the bridge in controversy.

"2. Is the channel under the alleged bridge in controversy without water flowing through it the greater part of the time? Ans. No; the channel over which the said bridge is situated is not without water running through it the greater portion of the time.

"3. Was the alleged bridge in controversy in this cause out of repair at the time of the accident to William Wagner, deceased? Ans. Yes.

"4. Had the alleged bridge in controversy been repaired by the proper township authority a few days before the time of the injury received by William Wagner? Ans. Only partially, two planks being replaced by others."

The principal argument in support of the motion rests upon the theory that there could be no recovery *if the* bridge did not span a channel in which, at the crossing of such bridge, there was a flow of water the greater portion of the time. In other words, if the water did not flow in the channel at that point the greater part of the time, such channel would not be that of a *watercourse*, as defined by the law, and the county would not be required to keep the bridge over it in repair.

Without considering the correctness of the position assumed, we recall the thoroughly established rules of practice that the general verdict must prevail unless the answers to interrogatories stand in absolute conflict with it, and that such conflict is not raised by answers within

themselves conflicting. *Heltonville Mfg. Co.* v. *Fields*, 138 Ind. 58, and cases there cited.

If the appellant's theory were correct, the first answer would raise such necessary conflict with the general verdict, but in the same respect the second answer would confirm the general verdict. The two answers are in emphatic conflict, and the general verdict was properly permitted to stand.

The fourth assigned error is in the overruling of the appellant's motion for a new trial. The first ground of the motion for a new trial was that the verdict was contrary to the evidence, and upon this ground the appellant urges four propositions, viz., was it shown:

1st. That the bridge was such as the county was required to keep in repair?

2d. Was it over a watercourse?

3d. Was it out of repair?

4th. Was the accident due to the ill repair of the bridge?

The fifth, seventh, eighth, ninth and tenth grounds of the motion related to the admission of evidence. The appellee objects to a consideration of the propositions so involved for the reason, as urged, that all of the evidence is not properly in the record. The transcript discloses the introduction in evidence, of six photographs and a map of the situation surrounding the place of the accident. The map, it affirmatively appears, was employed in the examination of witnesses, and without it many questions and answers, in the record, are unintelligible. The photographs and the map were not in the transcript when it was filed in this court, but one year after such filing, and when the appellee had insisted that they were not in the record, they were sent, by counsel, to the clerk with a letter explaining their omission as unavoidable, and suggesting that, inasmuch as

the bill of exceptions contained the usual concluding statement, "this was all the evidence given in the cause," no inquiry could be made of such omitted evidence. No suggestion of the appellant's views of this question is made in the briefs, and we adopt the suggestion of the latter as the only possible defense of the record. But in view of the frequent decisions of this court, this defense is insufficient. It has often been held that where the bill of exceptions affirmatively shows the introduction of evidence, which evidence is omitted from the transcript, the statement of the bill that it contains "all of the evidence given in the cause" will not prevail. Elliott's App.. Pro., section 824. *Saxon* v. *State*, 116 Ind. 6; *Harris* v. *Tomlinson*, 130 Ind. 426, and cases there cited. It must, therefore, be held that the evidence is not in the record, and that no question arising upon it can be considered.

The appellant assails a number of the instructions given at the request of the appellee, as failing to properly define a natural watercourse. The theory of the appellant is, that there can be no recovery for an injury sustained from a defective bridge unless such bridge crosses a natural watercourse, and connects a public highway. The cases in this State are in confusion upon this question, many apparently holding that the liability arises from the fact that the bridge forms a part of the highway, and not depending upon the size of the bridge or the character of the stream or body of water crossed by it. *Board, etc.*, v. *Arnett*, 116 Ind. 438; *Board, etc.*, v. *State, ex rel.*, 113 Ind. 179; *Board, etc.*, v. *Montgomery*, 109 Ind. 69; *Vaught* v. *Board, etc.*, 101 Ind. 123; *Board, etc.*, v. *Bacon*, 96 Ind. 31; *Board, etc.*, v. *Emmerson*, 95 Ind. 579; *Board, etc.*, v. *Legg, Admr.*, 93 Ind. 523; *Board, etc.*, v. *Brown*, 89 Ind. 48; *Board, etc.*, v. *Pritchett*, 85 Ind. 68; *House* v. *Board, etc.*, 60 Ind. 580; *Har-*

ris v. *Board, etc.*, 121 Ind. 299; *Board, etc.*, v. *Washington Township*, 121 Ind. 379; and probably other cases. In the *Board, etc.*, v. *Legg, Admr.*, 110 Ind. 479, and *Board, etc.*, v. *Mutchler*, 137 Ind. 140, it was expressly held that the size of the bridge, and the character of the stream or ditch crossed were unimportant if the bridge was a part of a public highway, and liability was extended to bridges crossing ditches for the drainage of wet lands.

In *Board, etc.*, v. *Bailey*, 122 Ind. 46; *Board, etc.*, v. *Brod.* 3 Ind. App. 585; *Board, etc.*, v. *Castetter*, 7 Ind. App. 309; *Board, etc.*, v. *Blair*, 8 Ind. App. 574, it was held that section 2892, R. S. 1881 (section 3282, R. S. 1894), should be construed in connection with other provisions of the statute requiring counties to build and repair bridges, and when so construed the authority of the counties was to build bridges only over watercourses, and the duty of counties was only to repair such bridges as they were authorized to build.

The latest decision by this court is that of *Board, etc.*, v. *Mutchler*, *supra*, and if we found it necessary to reconcile the conflict suggested, and to adhere to the holding in that case, it would be unnecessary to decide whether the definitions of a watercourse given by the trial court in this case were correct, since they could in no way have harmed the appellant, but would have required more from the appellee than necessary to establish his cause of action. Our conclusion does not require that we should reconcile the cases cited. The statute, section 2885, R. S. 1881 (R. S. 1894, section 3275), authorizes the building or repair of bridges over watercourses, while section 2892, R. S. 1881 (section 3282, R. S. 1894), charges the boards of commissioners with the duty of causing all bridges in their counties to be kept in repair.

If, as suggested by some of the cases cited, these provisions should be construed together, and as authorizing the repair only of bridges over watercourses, we should conclude that natural watercourses alone were not intended, but that artificial courses were also included.

Several of our cases contain definitions of a *watercourse*, notably *Schlichter* v. *Phillipy*, 67 Ind. 201; *Weis* v. *City of Madison*, 75 Ind. 241; *Hebron, etc., Co.* v. *Harvey*, 90 Ind. 192; *Rice* v. *City of Evansville*, 108 Ind. 7; *Board, etc.*, v. *Bailey, supra; Board, etc.*, v. *Brod, supra*, and *Board, etc.*, v. *Castetter, supra*.

There are verbal differences in all of the definitions of the books, but that given in *Board, etc.*, v. *Castetter, supra*, is accurate. It is there said that "in its most general sense, it means a course or channel in which water flows. In its legal sense, it consists of bed, banks and water, a living stream confined in a channel, but not necessarily flowing all the time." The word *living* is here employed in the sense of *permanent* or *continuous*, as used in *Board, etc.*, v. *Bailey, supra*, and *Rice* v. *City of Evansville, supra*.

The instructions given were as follows:

"4. Although mere ravines, through which only surface water occasionally flows, are not natural streams or watercourses, within the meaning of the law, yet to constitute a natural stream or watercourse there need only be a natural bed and banks and evidence of a permanent stream of running water, though it may often contain no water, and may sometimes be dry.

"5. To constitute a natural stream or watercourse, within the meaning of the law, it is not necessary that it should at all times contain running or moving water, nor indeed is it necessary that at any time there should be any certain amount or volume of water in or passing

through or along its banks and bed; in other words, the size of the stream is immaterial.

"6. The Supreme Court of this State, in stating what is, in law, a natural watercourse has used and adopted the following definition of the true doctrine upon the subject: 'Where the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is discharged through a well defined channel which the force of the water has made for itself and through which it flows and has flowed from time immemorial, such channel is a natural watercourse,' and, I instruct you, that if added to the water just mentioned such channel was assisted in being cut by the water from natural springs, which continue to run as a moving body of water in it, for large portions of each year after the water from the rains and melting snows has passed away, that fact of itself, though said channel might after, in dry times, have no water in it, might constitute, in law, a natural watercourse.

"7. A natural watercourse usually empties or debouches into some other stream or body of water, but this is not necessarily so, as the waters of the natural stream may sink into a cavity or be absorbed or taken down by rapid percolation into a bed of sand, gravel or soil.

"8. The fact that at a certain point or certain points in a natural watercourse the water in it in dry times sinks or percolates away into a natural bed of sand or gravel, and at such point or points leaves the bed of the channel dry does not of itself destroy the character of such part or parts of such channel as a natural watercourse."

"13. In this case, in order to show that the structure

in question was one over a natural stream or watercourse, it is sufficient if the plaintiff has shown to your satisfaction that the stream was one which had a natural channel with a bed and banks and evidences of carrying a permanent body of moving water, and it can make no difference that it was dry when the accident complained of took place."

These instructions the appellant considers separately, complaining that some are inadequate statements of the law, that others are misleading, and still others not applicable to the evidence. Of the last of these objections, we have seen that no consideration may be had since the evidence is not in the record. Considering all of the instructions together, as we must, they seem fairly to state the rule as we understand it and as it is deducible from the cases we have cited.

The appellant's contention is that a channel must have some other source of water supply than from mere surface drainage to constitute a watercourse within the meaning of the law. With this position the instructions do not disagree, as we understand them. It is also urged that by many definitions of a watercourse it is required that there shall be "ordinarily and most frequently a moving body of water," and from such definitions it is argued that if the water is not flowing in the channel for a greater portion of the year it is not a watercourse.

We do not understand that the authorities make the question depend upon the computation of the time which the water flows as compared with the time the channel is dry.

The channel should have a supply of living water, though it is not necessary that the supply should be sufficient at all times, or most of the time, to flow the entire length of the channel.

The appellant urges, also, that the court erred in refusing certain instructions asked.

The first instruction so asked was drawn upon the theory that there could be no liability unless the bridge in question crossed a *watercourse*. The same proposition was given to the jury in the appellant's fourth instruction, while, as stated in that so refused, it was incorrect in predicating that conclusion upon section 2885, R. S. 1881, instead of that section and section 2892, *supra*.

Appellant's instruction numbered six stated that ravines and hollows serving only for surface drainage, were not watercourses, and that they do not become watercourses unless the water ordinarily and most frequently flows through them. It will be seen that two propositions are included in the instruction, the first of which was embodied in charge numbered four, given by the court and copied above, while the second, as we think, is not the law.

The third instruction refused defined a watercourse as a channel with water flowing from its source to its mouth continuously. We have already suggested the objection to this proposition.

Instruction numbered five was as follows: "The bed of a watercourse is a natural object. The banks on either side of the bed are fast land, on which vegetation grows, unless the banks are too steep, and the bed is composed of loose or shifting soil or sand or gravel or rocks and having in it no vegetation, or only such as grows when commonly covered with water."

We think the instruction misleading, and properly refused. The bank of a watercourse is not necessarily fast land on which vegetation grows, unless the bank is too steep. Common observation teaches that banks of some watercourses are shifting sand and gravel producing little or no vegetation, and that others are solid limestone,

producing no vegetation, and while the beds of some are composed of loose or shifting soil or sand or gravel, others are sandstone or limestone, perfectly solid and free from shifting soil, sand, or gravel. If the evidence disclosed—and we can not say that it did not—that the course in question had a solid limestone bed, it would have been the duty of the jury, under the definition asked, to have found that it was not a watercourse.

Instruction numbered nine, refused by the court, sought to charge the jury, as the duty of the commissioners in the matter of repairs upon the bridge, and, in doing so, stated that one element to be considered, in determining whether the bridge was out of repair, was all the surroundings and the use for which the bridge was intended when it was built, and the purpose for which it was maintained after it was built. If built by the trustee of the township, by a supervisor, or by a citizen, it matters not what the use or intention in the building, whether temporary or permanent, and when, if ever, it became the duty of the commissioners to maintain it, that duty permitted no other consideration than the reasonable safety of those crossing the bridge in a proper manner. So, if it was constructed by a former board.

Other instructions refused and modified are pressed by counsel, but they depend upon the evidence or embody some question already passed upon.

We find no error presented by the record, and the judgment of the circuit court is affirmed.

Filed Sept. 25, 1894.

No. 16,180.

138 621
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EVANS ET AL. *v.* WEST.

GRAVEL ROAD.—*Proceeding to Establish.—Jurisdiction.—Remonstrance. —Collateral Attack.*—Where, in a proceeding to establish a free gravel road, under sections 6855 *et seq.*, R. S. 1894, all the steps are taken by the board of commissioners necessary to acquire jurisdiction of the subject-matter and of the persons affected, and a judgment is rendered without remonstrance ordering the road to be constructed, any subsequent remonstrance, saving exceptions as to the assessment of benefits, is a collateral attack upon such judgment, and unless the proceedings are void, should be dismissed by the board.

SAME.—*Using Part of Road Already Constructed.*—A proceeding for the construction of a free gravel road, under sections 6855 *et seq.*, R. S. 1894, is not void because the line of the road, between its terminal points, passes over a part of the line of another road already constructed.

From the Boone Circuit Court.

T. W. Lockhart and *O. P. Mahan*, for appellants.

T. J. Terhune and *W. A. Pickens*, for appellee.

HOWARD, J.—This was a proceeding to establish a free gravel road, under provisions of section 6855, R. S. 1894 (section 5091, R. S. 1881), and following sections.

The petition for the road, signed by the requisite number of landholders, was filed in the commissioners' court of Boone county, on the fifth day of March, 1889, at a regular session of the board. With the petition was filed the required bond for the preliminary expenses of the work, approved by the county auditor.

On the sixth day of March the commissioners granted the prayer of the petition, and thereupon appointed viewers and an engineer, who were directed to proceed on the seventeenth day of April to lay out the road. Notice of the meeting of the viewers, stating the kind of

improvement asked for, the beginning, intermediate points and termination, was duly given by publication.

The viewers proceeded with their work and made a report in writing of their proceedings, finding that the road would be of public utility, specifying the lands to be assessed, indicating the line of the road and the character of the improvements, giving an estimate of the cost, etc., which report they filed with the auditor on the tenth day of June.

On the twelfth day of June, 1889, the commissioners, in regular session, approved and confirmed the report of the engineer and viewers without remonstrance or objections, and ordered the improvement to be made. The order stated fully and in detail the kind of improvement to be made, the width and extent of the same, and the lands which should be assessed; that a majority of the resident landholders whose lands were reported as benefited and to be assessed, and also the owners of a majority of the whole number of acres which were reported as benefited, had signed the petition for the improvement. On the same day the board appointed an engineer to superintend the construction of the work, and also appointed a committee to apportion the estimated expenses upon the real estate embraced in the order.

After due notice to bidders for the work, the engineer, with the concurrence of the board, did, on the ninth day of August, let the contract for the construction of the road, the same to be completed by the first day of December, 1889. The contractors at once entered upon the work, under the superintendency of the engineer, and on September 9th the work was fully half completed.

The committee appointed to apportion the estimated expenses did, upon actual view of the premises, make such apportionment, and on the first day of August filed their report with the auditor. Of the filing of this re-

port, the auditor gave due notice by publication, and that the commissioners would consider such report on September 9, 1889.

At the meeting of the board, on September 9, 1889, the appellee filed what is called a remonstrance asking the board to dismiss the cause for the reason that all proceedings in relation thereto were void. On the 11th day of September, the board, after due consideration, dismissed the remonstrance and approved and confirmed the report of the committee.

An order for the issue of bonds to pay the expenses of constructing the road was made by the board in regular session on the 2d day of September, 1889; and on the 5th of September the bonds were issued and placed in the hands of the county treasurer for sale. On the 9th of September, after due notice, the bonds were sold.

On the 14th of September, 1889, the appellee filed his appeal-bond and prayed an appeal to the Boone Circuit Court.

After numerous proceedings, including changes of venue both from the judge and from the county, the cause was finally tried in the Boone Circuit Court before the special judge below, who made a finding of facts, with conclusions of law in favor of the appellee as remonstrator, holding that the proceedings of the board were void as to him.

From the facts found by the court, it appears that all steps required by the statute for the establishment of a free gravel road were taken in this case. The petition for the road was presented to the board, and was granted by them; viewers and an engineer were appointed to locate and define the work, and notice of their meeting given. The viewers and engineer met and made their report, laying out and specifying the work to be done.

This report was approved and confirmed, and the road ordered constructed.

It would seem, therefore, that there could be no question that the board acquired jurisdiction both of the subject-matter and of the persons, that is, the road to be established, and the persons liable for the cost of its improvement. *Stoddard* v. *Johnson, Treasurer*, 75 Ind. 20.

Notice was given, as required by statute, of the meeting of the viewers, and of the kind of improvement upon which they were required to report; and exceptions to this report, and to the character of the work, if any there were, should have been filed with the commissioners before the approval of the report, and the ordering of the work done by the board at their June session, 1889. Such exceptions made afterwards could only be made by way of collateral attack upon the judgment of the commissioners' court. See *Gilson* v. *Board, etc.*, 128 Ind. 65.

The exceptions provided for by the statute, to be made to the report of the committee appointed to apportion the whole assessment upon the several tracts of land to be benefited, contemplate only a proper adjustment of such assessments, and are not intended to apply to the petition or the report of viewers, or to orders of the board approving or confirming the same, or, in fine, to any part of the proceedings prior to the ordering of the work done. That order was an adjudication as to all prior proceedings, and could be called in question only by appeal taken from the final order, on exceptions seasonably made, unless indeed those proceedings, or some of them, were wholly unwarranted by the statute. *Wilkinson* v. *Lemasters*, 122 Ind. 82.

It is clear, then, that the paper filed by the appellee, at the September term, 1889, called a remonstrance, was but a collateral attack upon the prior proceedings

to which no remonstrance or exceptions had been made or taken. If the action of the commissioners in establishing the work and ordering it done, including the assessment of benefits, and the issue of bonds in payment of the cost of the improvement, was not utterly void, even though it may have been irregular in some particular, then the dismissal of the remonstrance by the board was correct, and the court was in error in its conclusions of law. If, however, the proceedings before the commissioners were in fact void, by total failure of statutory power, then the conclusions of law were correct, and the judgment must be affirmed.

It is contended that the proceedings before the board were void for the reason that the petition asked for two improvements instead of one, that the work petitioned for and ordered done comprises "the building of a gravel road, consisting of two separate parts not contiguous, but which, when built, would be connected by an old pike road which was in existence at the time the new road was ordered."

The petition described the location and terminal points of the improvement in controversy as follows:

"Commencing at or near the point where the Lebanon and Elizaville gravel road meets Howard street, in the town of Elizaville, Boone county, Indiana, and run from thence east with the road or street to where a road turns south; thence with the same a general southerly direction on, or as near as found best, to the section line dividing sections 1 and 2, 11 and 12, 13 and 14, 23 and 24, 25 and 26; also, dividing sections 35 and 36 to where it terminates in the Noblesville gravel road at the southwest corner of said section 36, all being in township 19 north, range 1 east, Boone county, Indiana, and being a distance of about six miles, including about one and one-

half miles which passes over and upon the part of the Lebanon and Slabtown gravel road, located between said sections 25 and 26."

The court knows that the line so described is a continuous line from the beginning to the end of the proposed gravel road. The fact that the work contemplated passes over and includes a part of a gravel road already constructed can not of itself destroy the singleness of the work proposed to be done. If it crossed another gravel road, instead of intersecting a part of it lengthwise no one would contend that two proposed improvements instead of one would thus be described. It would seem that the objection to the petition is too technical, and contrary to the spirit of the statute, which requires that "public utility and convenience" should be consulted in these proceedings.

The petition plainly indicates the line of the road. It was the duty of the viewers to point out, and of the board to order, the kind of improvement to be made, the width and extent of the same. The board should also make any alteration in the manner of the improvement as public necessity might require. *Gipson* v. *Heath*, 98 Ind. 100.

If the viewers found that in crossing or intersecting another improvement, as a bridge, a railroad track, or another gravel road, the improvement intersected ought to be so changed as to conform to the proposed work, that was a matter for them and the board to consider. If, on the contrary, they found the intersecting improvement to be already sufficient to conform to the work proposed, that, too, was for their consideration and that of the board.

A public drain may be established over the line of another drain, *Meranda* v. *Spurlin*, 100 Ind. 380; *Denton* v. *Thompson*, 136 Ind. 446, and no sufficient reason has

been given why a gravel road may not be treated in like manner. In either case it is a question for those who are appointed to locate the work and to make the assessment of its cost. If the bridge, railroad crossing, old gravel road or other intersecting part of the contemplated gravel road does not need improvement, but is already of a grade and condition to become a part of the new work, we see no reason why such fact should make of the contemplated work two or more improvements instead of one. The public convenience, to which the statute calls attention, will certainly be promoted by having the whole work done under one petition and by one proceeding and contract.

The appellee in this case is not harmed by having the work done as one improvement. His lands lie within two miles of both parts of the line, and if there were two petitions instead of one his lands would be subject to assessment for both works. Even, therefore, if there were a technical irregularity in including the whole line of road in one proceeding, as we do not think, the appellee has not been thereby injured, and as the gravel road law was intended by the Legislature to be liberally construed in promotion of the object intended to be accomplished thereby, he should not be heard to complain where he has received no harm. *Stoddard* v. *Johnson*, 75 Ind. 20.

The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to render judgment in favor of the appellants.

Filed Sept. 21, 1894.

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No. 16,834.

MAYER *v.* HAGGERTY.

JUDGMENT.—*When will be Considered as Rendered.*—Where a court reads and files a finding and orders judgment to follow the finding, judgment will be considered as rendered of that date.

SAME.—*Time of Appeal.*—The time within which an appeal must be taken begins to run from the date of the rendition of the judgment and not from the date of its entry by the clerk in the order book.

SAME.—*Nunc Pro Tunc Entry of.—Time of Appeal.*—Where a judgment is entered *nunc pro tunc*, the time within which an appeal can be taken dates from the day on which the judgment should have been entered and not from the date on which the order for the *nunc pro tunc* entry is made.

SAME.—*Partition.—Final Judgment.—New Trial as of Right.*—Where, in a suit for partition, the title to the real estate is put in issue, and a judgment is rendered as to all the matters in issue, with the usual order for partition, the judgment is a final one as to such matters, and a motion for a new trial as of right must be made within one year from its rendition.

SAME.—*Lien of.—Bankruptcy.—Discharge.*—The lien of judgments rendered against a debtor prior to his discharge in bankruptcy does not attach to the third interest in land vested in his wife by the register's conveyance to the assignee in bankruptcy, which interest he inherits after his discharge.

REAL ESTATE.—*Improvements During Litigation.—Bona fide* improvements, for which a claim can be made, can not be put upon land pending litigation concerning it.

SPECIAL JUDGE.—*Appointment.—Presumption of Regularity.*—In the absence of a showing to the contrary, it will be presumed on appeal that the trial court acted within the law in appointing a special judge.

SAME.—*Powers of.—Nunc Pro Tunc Entry.—New Trial.*—A special judge appointed to try a cause is the proper person to consider motions therein for a *nunc pro tunc* entry of judgment and for a new trial.

From the Vigo Circuit Court.

I. N. Pierce, W. Mack, D. W. Henry, G. M. Crane and *J. T. Crandell*, for appellant.

C. F. McNutt, J. G. McNutt and *S. B. Davis*, for appellee.

DAILEY, J.—This suit was brought by appellee, Haggerty, against Anton Mayer, in which plaintiff claimed an one-third interest in certain lands for partition. The lands had belonged to Haggerty, and were sold in 1878 by his assignee in bankruptcy, to appellant. Before the sale, the appellee had a wife, who, he claimed, inherited the undivided one-third part thereof under the statute. The wife died prior to the sale, and the appellee asserts title by descent from her.

The appellant, after purchasing the interest from the assignee, claims to have purchased the remaining interest by sale on execution issued on judgments that were rendered prior to the judgment of bankruptcy.

The complaint is in two paragraphs, the first a simple petition for partition; the second sets out appellee's title to one-third of the real estate in controversy, and admits appellant's title to the undivided two-thirds, also that appellant claims to hold judgment liens which he is seeking to enforce against appellee's share, by sheriff's sale, setting up facts to show that said liens are satisfied, and asking that they be so declared; that appellee's title be quieted, and for partition.

Mayer demurred to the second paragraph. The court overruled the demurrer, and an exception was taken. He then filed a general denial and counterclaim in two paragraphs. Haggerty filed an answer to the counterclaim, to which Mayer demurred. The court overruled the demurrer, to which he excepted.

The cause then came on for trial before the Hon. Joshua Jump, special judge, and was by him tried. On the 4th day of February, 1890, the court made its special finding, in which it fully settled all the issues as to the rights of the parties, finding that appellant owned two-thirds of the real estate and appellee the one-third thereof; that appellee owed appellant $132.45 for one-third of

the taxes and street improvement assessments paid by appellant, and ordering partition, and that the debt found due to appellant should be paid to him by the commissioners in the assignment of interests.

The court prepared the entry of the finding for the clerk, and, at the close of the said entry, the court's decree, so prepared, reads: "Judgment and decree accordingly," and that partition be made of said real estate, etc.

The court filed the entry with the clerk on February 4, 1890. The clerk, in entering the finding and judgment on the order-book, by mistake, omitted the judgment directed by the court. It is quite clear that upon the findings there should have been final judgment, as ordered by the court, upon all the matters found, followed by the usual order appointing commissioners to make partition.

The record shows that on February 4, 1890, the court appointed commissioners, who, on July 11, 1890, reported partition to the court, and that on said day the court ordered the confirmation of said report. On the 11th day of July, 1891, Mayer moved for a new trial as of right. This motion was made before the Hon. David N. Taylor, regular judge of said court, who ordered a new trial, and reinstated the case on the docket. Afterwards, on the 8th day of September, 1891, a motion was made by Haggerty to set aside the order granting a new trial therein, which was sustained by the court, and the order was set aside. On the 30th day of November, 1891, the court, of its own motion, appointed Hon. Joshua Jump as special judge to hear and determine said cause, to which Mayer, at the time, excepted. On March 16, 1892, Haggerty filed his motion for an entry *nunc pro tunc*, asking for an entry of the judgment as of February 4, 1890, showing that final judgment was then

rendered on the issue, quieting the title, which motion the court sustained, and ordered the entry to be so made, over appellant's objection and exception. Haggerty then moved to dismiss the application for a new trial under the statute, on the grounds that it was not made within a year after the final judgment was rendered, which motion was sustained by the court, and the motion for a new trial was stricken out. From this decision an exception was taken, and Mayer prosecutes this appeal.

Appellee insists that the record presents the fact that the appeal was taken too late. The original finding and judgment were given on February 4, 1890. The appeal was prayed April 16, 1892, more than two years after the final judgment, and not perfected until January 14, 1893. The *nunc pro tunc* judgment relates back to the time when it was rendered. It is defined: "Now for then; that a thing is done at one time as of another time, when it should have been done." 16 Am. and Eng. Encyc. of Law, p. 1005.

"The effect of this record was to enter judgment as of the former date, and when entered it stood as a judgment, of that date, and had the same effect as if it had been properly entered of record and signed by the judge" on the 4th day of February, 1890. *Leonard* v. *Broughton*, 120 Ind. 536 (544, 545).

The time within which an appeal must be taken begins to run from the date of the rendition of the judgment and not from the date of its entry by the clerk in the order book. In this case the court rendered its judgment when it read and filed its finding, on the 4th day of February, 1890, and ordered judgment to follow the finding. *Anderson, Admx.*, v. *Mitchell*, 58 Ind. 592; *Chamberlain* v. *City of Evansville*, 77 Ind. 542 (548); *Chissom* v. *Barbour*, 100 Ind. 1; *Gray* v. *Palmer*, 28 Cal.

416; *Peck* v. *Courtis*, 31 Cal. 207; *Genella* v. *Relyea*, 32 Cal. 159; 1 Black Judg., sections 130, 131.

It is clear, from these authorities, that the appeal comes too late to bring before this court the proceedings prior to and in the trial on the merits. The assignment of error is, that the court erred in setting aside the order granting a new trial as of right.

Section 1064, R. S. 1881, Burns' R. S. 1894, section 1076, provides that: "The court rendering the judgment, on application made within one year thereafter * * * shall vacate the judgment and grant a new trial."

Appellant contends that there was no final judgment on February 4, 1890, but merely an interlocutory order of partition, but the record disposes of this position. As appellant says in his brief, "both the complaint and cross-complaint put in issue the title to one-third of the real estate." He also demanded judgment for certain expenditures, and that if the title to one-third was found to be in the appellee, he should have judgment for the money so expended, to be declared a lien on the property. This, then, was not a simple partition suit. Had it been, appellant would not be entitled to a new trial as of right. Ordinarily, the title to real estate is not involved in an action for partition. But when, as in this case, the title to lands is directly put in issue, the judgment of partition is conclusive as to the rights of the parties. *Thorp* v. *Hanes*, 107 Ind. 324; *Watson* v. *Camper*, 119 Ind. 60; *L'Hommedieu* v. *Cincinnati, etc., R. W. Co.*, 120 Ind. 435; *Isbell* v. *Stewart, Admr.*, 125 Ind. 112.

The court having ordered the clerk to enter a judgment and decree upon all the findings, his inadvertent omission therefrom of everything but the order of partition can not deprive the appellee of his rights under the findings. In view of the facts disclosed by the record, a

final judgment was indispensable before a decree of partition could be properly entered at all. It is also true that if the court had found for the appellant on the issue of title, the judgment would have been final.

In Black on Judgments, section 39, and note, it is laid down as a rule that the first decree in partition may be final, and it will have that character, if it settles all the rights of the parties and leaves nothing for the future consideration or judicial action of the court. In the case at bar, the court rendered a final judgment as to all the matters in issue, and made the usual order for partition. After a decree has been entered, no further questions can come before the court, except such as are necessary to be determined in carrying it into effect. The decree is final. Freeman Judg. (3d ed.), section 36; *Fleenor* v. *Driskill*, 97 Ind. 27 (34); *Kreitline* v. *Franz*, 106 Ind. 359.

No doubt an appeal would lie from the confirmation of the report had the question of the fairness of the division been raised by the exceptions, but this was not done. In the case under consideration, no motion for a new trial was made at the term at which the judgment fixing the rights of the parties was rendered, and it follows that no question as to a new trial is in the record. *Jones* v. *Jones*, 91 Ind. 72 (76).

Appellant's learned counsel discuss at length the sufficiency of the second paragraph of the complaint, but it seems there is no such question before this court. Besides, appellant's answer and cross-complaint presented every conceivable issue.

An issue of fact was formed by reply and answer to the cross-complaint, a trial was had, the evidence is not in the record and we must indulge the presumption that the finding of the court was sustained by the evidence, so that it is immaterial whether this paragraph of the

complaint is good or bad. It is insisted by the appellant, that the judgments against Haggerty were liens prior to the bankruptcy, subject to the inchoate rights of the wife, and on conveyance to the assignee, her rights became absolute to some parts of the lots in question; also, that on the death of the assignee's wife the interest held by her descended to him, whereupon the judgment liens attached to such interest in the same manner as if there had been no wife.

We think it is the law that the conveyance of a married man's land by a register in bankruptcy to the assignee is such a sale as vests the title to one-third in the wife and gives her the right to partition at once. The sale by the assignee has nothing to do with fixing the rights of the wife. *McCracken* v. *Kuhn*, 73 Ind. 149; *Ketchum* v. *Schicketanz*, 73 Ind. 137· *Roberts* v. *Shroyer*, 68 Ind. 64.

The appellee alleged, in his complaint, that the appellant purchased the two-thirds from the assignee for $100, subject to said liens and assumed their payment. Appellant denied the allegation, trial of that issue was had, resulting in a judgment for the appellee. The evidence, as stated, is not in the record, so that no question of the sufficiency of the evidence is presented to enable this court to disturb the judgment. It is contended by appellant's counsel, that after the death of the wife the lien of the judgments re-attached.

If, as the court found on the issues tried, the appellant took the two-thirds, subject to the liens, and assumed their payment, that satisfied the liens in his hands as they were. Counsel argue that the lien of appellant's judgment subsisting against two-thirds of the real estate attached to the one-third when he took as forced heir of his wife, under the statute giving a wife the right to partition of the husband's lands upon

judicial sales. Undoubtedly judgment liens would attach to real estate so acquired coming to a judgment debtor. But in this case it did not occur, for the reason that appellee had been discharged in bankruptcy long before the wife's interest vested in him. It is next urged by appellant, that he was entitled to an allowance for improvements on the lots. The court tried this question, and rendered judgment against the appellee upon that issue for $132, for improvements upon streets and for taxes. As the evidence is not in the record, we can not consider the question as to amount. It seems there was an attempt to claim for buildings erected upon the lots by appellant and others pending litigation. We think the proposition is fundamental that there can be no *bona fide* improvements made under such circumstances, and moreover the court found against the appellant on this issue. In our opinion there is nothing in the appellant's contention that the court below had no authority to appoint a special judge. It was proper for the presiding judge, in his discretion, to decline to preside during the trial of the cause. *Joyce* v. *Whitney*, 57 Ind. 550 (554); *Leonard* v. *Blair*, 59 Ind. 510 (514). This court, in the absence of a countervailing showing, will indulge the presumption that the court below acted properly and within the limits fixed by law. Besides, in this case, the special judge was peculiarly the person to whom the petition for a *nunc pro tunc* entry and the motion for a new trial should have been addressed. He was "the court rendering the judgment." R. S. 1881, section 1064; Burns' R. S. 1894, section 1076. "When the regular judge yields the bench, calls in a special judge, and duly appoints him to try a designated cause, the special judge thus appointed acquires full authority over the cause throughout all of its stages." *Perkins* v. *Hayward*, 124 Ind. 445, section 415, R. S. 1881, Burns'

R. S. 1894, section 419, provides that a special judge "shall have power to hear and determine said cause until the same is finally disposed of." The law provides for the motion for a new trial, and for petitions and orders for *nunc pro tunc* entries, and in the very nature of things no one else could intelligently dispose of them.

There is no error in the record, and the judgment below is affirmed.

Filed Sept. 19, 1894.

No. 16,637.

The Michigan Mutual Life Insurance Company *v.* Leon.

Life Insurance.—*Application.—False Entries in by Agent.—Estoppel.*—Where an applicant for life insurance, in good faith, gives truthful answers to the questions asked him, but the agent, whether purposely or otherwise, without the knowledge or connivance of the applicant, inserts false answers, the wrong is that of the assurer, and the latter is estopped from imputing it to the assured.

Same.—*Failure of Assured to Read Answers in Application and Policy.—Negligence.*—An applicant for life insurance is justified in assuming that the agent has, in good faith, correctly recorded his answers to the questions asked; and if the answers are given by him truthfully and in good faith, he is not chargeable with negligence if he signs the application thus prepared without reading it, or if he accepts and retains the policy issued thereon, with a copy of the application attached, without searching it to ascertain whether the assurer's agent had acted honestly with his principal.

From the Delaware Circuit Court.

J. L. McMaster, *J. W. Ryan*, *W. A. Thompson* and *A. Boice*, for appellant.

R. S. Gregory, *A. C. Silverburg* and *J. N. Templer*, for appellee.

Coffey, J.—This was an action by the appellant, a

foreign insurance company, commenced in the Delaware Circuit Court against the appellee and her husband, Leonidas Leon, to cancel a policy of insurance issued upon the life of the latter, and payable to the former. The complaint alleges, among other things, as a ground for cancellation that the policy was procured by means of false and fraudulent answers to questions contained in the application for the policy, upon which false answers the appellant relied at the time it issued the policy, among which questions and answers were the following: "Has any application for insurance upon your life ever been made to any company upon which a policy has not been granted?" "No."

"Has any unfavorable opinion upon the insurableness of your life ever been given by a physician?" "No."

It is alleged in the complaint that the answers to these questions were false.

During the pendency of the suit Leonidas Leon died, whereupon the appellee, to whom the policy is payable, after notice and proof of such death and the refusal of the appellant to pay, filed a cross-complaint based upon such policy, seeking to recover the amount secured thereby.

Issues were formed upon the complaint and cross-complaint, which were tried by the court without the intervention of a jury, resulting in a special finding of the facts in the case, with conclusions of law thereon, upon which the court rendered judgment in favor of the appellee on her cross-complaint for the full amount of the policy, and against the appellant for costs on the original complaint.

The merits of the controversy turn upon the questions and answers above set out. As the special finding of facts is full, and will enable us to determine the controversy upon its merits, it is unnecessary that we should

further notice the pleadings in the case, except to remark that such finding is, in our opinion, within the issues thereby tendered.

So much of the special finding as relates to these questions and answers is substantially as follows:

On the 21st day of February, 1889, the plaintiff, the Michigan Mutual Life Insurance Company, was then, and is now, a corporation organized under the laws of the State of Michigan, with its principal office in the city of Detroit, in said State, and was then, and is now, doing a general life insurance business; and that on said day, said corporation was engaged in doing a general life insurance business in the State of Indiana, and that one Jacob Frankel was then, and ever since has been, and is now, the general agent of said corporation for the State of Indiana (except in the counties of Jay and Huntington, in said State), with full power to solicit applications for insurance for said company, upon blanks furnished by it, and to deliver all policies issued by said company in said State, except in the counties aforesaid, and to collect premiums thereon; but that said Frankel had no power to issue policies of insurance in said company, or to determine whether policies should, or should not, be issued upon such application; that said Frankel had and has no superior officer or agent over him in said State; that policies of insurance were issued by the executive officers of said company, at its home office in the city of Detroit, upon the approval of such application by the medical director of said company; that on said 21st day of February, 1889, said Frankel, as such agent, was introduced to, and made the acquaintance of, one Leonidas Leon, at his place of business in the city of Muncie, Indiana; that said Frankel thereupon informed said Leon that he was the State agent for the Michigan Mutual Life Insurance Company, and stated that he desired the said

Leon to make application for insurance on his life in said company; that said Leon and others then present thereupon informed the said Frankel that it would be useless for the said Leon to make such application, for the reason then given, that he, the said Leon, had been refused insurance on his life, and rejected by the Connecticut Mutual Life Insurance Company about two years before that time; that after receiving such information, the said Frankel stated to the said Leon that such refusal and rejection made no difference, because two years had elapsed since then; that said Leon then informed and stated to said Frankel that if such rejection by said Connecticut Mutual Life Insurance Company made no difference, he was willing to apply for insurance upon his life in the company represented by said Frankel; that said Frankel, as such agent, then produced to said Leon a blank application for insurance in said Michigan Mutual Life Insurance Company, and read over to said Leon separately each question contained in said blank application; that among other questions propounded by said Frankel to said Leon was the following: "Has any application for insurance upon your life ever been made to any company, upon which a policy has not been granted?" And to said question the said Leon made answer: "Yes, I made application in the Connecticut Mutual Life Insurance Company about two years ago, and was rejected." That said Frankel, with full knowledge of the answer made by said Leonidas Leon, did not write the said answer as made by said Leon, but instead thereof, wrote on said application blank the word "No," as the answer thereto; that said Frankel also propounded to said Leon the following question: "Has any unfavorable opinion upon the insurableness of your life, ever been given by a physician?" To which said question the said Leon then and there made answer, "Yes." That said Frankel,

answers as written thereon, for said insurance; that said policy was afterwards forwarded by mail by said company to Jacob Frankel at Richmond, Indiana, and was, by said Frankel, sent by mail to said Leonidas Leon, at Muncie, Indiana; that said policy, with said attached copy of said application, was received by said Leonidas Leon on the 6th or 7th day of March, 1889; that said Leon did not read said policy or the application attached thereto, after the same was received by him, and did not have any actual knowledge that any answer or answers to any question or questions contained in said application had been incorrectly or untruthfully written therein; that said Leon deposited said policy in a private box in the safe in the business house where he did business; that after receiving said policy, to wit, on the 8th day of March, 1889, said Leon executed his note for the sum of $91, payable to the order of the plaintiff, and due in thirty (30) days from date, being for the first annual premium on said policy of insurance, less the commission of said agent, Frankel, as agreed upon between said Leon and said Frankel; and that afterwards, to wit, on the 8th day of April, 1889, said Leon paid said note in full to said Frankel as the agent of said insurance company; that after receiving said policy of insurance the said Leonidas Leon informed his wife, the said Nettie Leon, of the fact that he had procured his life to be insured for her benefit in the sum of five thousand dollars: that said policy of insurance, with the copy of said application thereto attached, was thereafter continuously in the possession and under the control of said Leonidas Leon until the time of his death; that said Leonidas Leon did not at any time read said policy, or the application and answers thereto attached, and did not have any actual knowledge that any answer or answers to any questions contained in said application had been incorrectly

or untruthfully written therein until a demand for the cancellation of said policy was made upon him by the plaintiff; and that he relied upon the statements made to him by said Frankel at the time the application for said insurance was solicited of him by said Frankel.

Before the 21st day of February, A. D. 1889, and before making application to the plaintiff company for insurance on his life, said Leonidas Leon had made application for insurance upon his life, in the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, and had, at that time, been rejected as an applicant for insurance upon his life, and that an unfavorable opinion had then been given by a physician, as to the insurableness of his life; that the said Leonidas Leon had never been rejected as an applicant for insurance upon his life in any other company.

On the 25th day of August, 1889, said Leonidas Leon, while on a railroad train, received an injury on the left side of his chest and body, and immediately thereafter became dangerously ill, and continued to be so afflicted, and, lingering, died on the 4th day of October, 1890; that on the 15th day of November, 1890, the said Nettie Leon, the beneficiary named in said policy of insurance, caused due proof of the death of said Leonidas Leon to be made upon the blank of said company, which said proof of death was duly received and brought to the notice of the plaintiff company on the 21st day of November, 1890.

No officer or agent of the plaintiff, other than the said Jacob Frankel, had any knowledge that any answer to any question in said application for insurance, by Leonidas Leon, was incorrectly or untruthfully written thereon, when said policy of insurance was issued. In the month of September, 1889, the said Jacob Frankel learned of the dangerous illness of said Leonidas Leon,

and that on the 3d day of October, 1889, the said Frankel communicated to Herman F. Frede, the assistant secretary of the Michigan Mutual Life Insurance Company, the information of the said sickness of Leonidas Leon, and the fact that said Leon had been rejected by the Connecticut Mutual Life Insurance Company, prior to the date of his application for insurance in the plaintiff company. On the —— day of October, 1889, the plaintiff tendered to said Leonidas Leon and said Nettie Leon the full amount of the premium paid by Leonidas Leon on said policy, together with legal interest in gold coin of the United States of America, and thereupon demanded a surrender and cancellation of said policy of insurance, which said tender was rejected and said surrender and cancellation refused by Leonidas and Nettie Leon; that said sum of money was deposited in the clerk's office of the Delaware Circuit Court at and before the commencement of this suit, in continuation of said tender.

Nettie Leon, the defendant and cross-complainant, is the widow of Leonidas Leon and the beneficiary named in said policy of insurance. The said Nettie Leon, at the time said application was made by said Leonidas Leon, and at the time said policy was issued and delivered to him, had no knowledge that any answer or answers in said application for a policy of insurance, had been incorrectly or untruthfully entered thereon; and that she never, at any time, had the actual possession or control of said policy of insurance, and never saw the same or the accompanying application, and answers therein contained, and had no knowledge of the contents thereof (excepting as she had been informed that she

the person named as one of the beneficiaries therein),

ior to the commencement of this action;

aid Leonidas Leon, on the 28th day of

February, 1890, tendered and offered to said
in good and lawful money of the United State
amount of the premium due on said policy, wh
was rejected by said company, and that Leonid
in his life was, and the said Nettie Leon was,
has been, ready and able to, and have discharg
duties resting upon them, by reason of said co
insurance.

Neither the said Leonidas Leon nor the sa
Leon ever made any objection to said applicati
any answer to any question as therein writte
said plaintiff, or any of its agents, and never
said company, or of its agents, any correcti
changes to be made in said application, or an
to any question therein written; or in any wa
or directed the attention of the plaintiff compan
incorrect and false answer.

As to this special finding it may be said of s
of the facts therein set out as relates to the q
propounded to the assured, and the answers wr
the agent of the appellee, that it is settled in this S
if the applicant for insurance, in good faith, give
ful answers to such questions as are asked him,
agent, whether purposely or otherwise, but with
knowledge or connivance of the assured, inserts f
swers, the wrong is that of the company, and n
of the assured. Under such circumstances the c
will be estopped from attributing the wrong to
sured. When truthful answers are given to thei
in good faith, the company has acquired a know
the truth, as it is charged with the knowledge ir
to its agent. As long as the assured acts in good f
is immaterial what the agent's motives may hav
for suppressing or perverting the truth. The ass
justified in assuming that the agent has, in good

in possession of all the facts affecting the risk, we think the assured might well assume that the policy was properly prepared, and was based upon such facts, and that he was under no obligation to make a diligent reading of the policy with a view of ascertaining whether the appellant's own agent had perpetrated a fraud upon it. To permit the appellant now, since a loss has occurred, to avoid its policy on the ground that it was deceived by its own agent, without the fault of the assured, is to permit it to violate one of the best known principles of the law, namely, to take advantage of its own wrong. It is equivalent to permitting it to say, it is true I issued to the assured the policy upon which the suit is based, but I will not pay it because I, through my duly authorized agent, was guilty of the wrong of falsely recording the answers made by the assured to the questions asked him.

The case of *Donnelly* v. *Cedar Rapids Ins. Co.*, 70 Ia. 693, and the case of *Boetcher* v. *Hawkeye Ins. Co.*, 47 Ia. 253, are, we think, much in point here. In the latter case cited, it was said by the court: "We can readily see that the assured may be bound to take notice of the conditions and covenants in the policy that affect his rights, or that apply to matters in existence at the time the policy is delivered, or that may occur in the future, but we know of no principle of law which requires him to diligently examine the policy for the purpose of ascertaining whether it contains false statements of fact as to a past transaction which he might well suppose was closed."

Though the appellant in this case, through its agent, had full notice of the matters of which it now complains, it took no steps to avoid this policy until the assured had been fatally injured in a railroad accident, and until it was too late to secure insurance elsewhere. Under

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Mandate to Enter.—Where, after a general verdict for a pl trial court gives judgment for the defendant upon answ terrogatories, the Supreme Court, on appeal by the pla finds such answers consistent with the general verdict w der a new trial, but will remand the case with instruction judgment upon the verdict.

From the Martin Circuit Court.

B. K. Elliott, W. F. Elliott, W. K. Marsha Zaring, M. B. Hottel and *H. McCormick*, for ap

H. D. McMullen, H. R. McMullen, J. Harmon Gardiner, S. H. Taylor, H. Q. Houghton, J. shall, W. M. Ramsey, L. Maxwell and *R. Ran* appellee.

HOWARD, J.—Plaintiff (appellant) filed an a complaint in four paragraphs, charging the de (appellee) with negligent conduct resulting in p injuries to himself, and demanding $51,000 dam

Demurrers to each separate paragraph were ov and the case came on for trial by a jury. They fo plaintiff, assessing the damages at $10,000, but ar certain special interrogatories submitted by the On motion of defendant, it was given judgment o answers. Plaintiff appeals.

In the first paragraph of his complaint, the p alleges that on November 28, 1889, his train was through the town of Shoals, on an up grade. Def requires its head or front brakeman to get off station for orders, while the train is in motion, a was one of the risks he undertook by his emplo When the train slowed up so that he could get o safety, the signal having been given that there w ders, plaintiff alighted from the train. The def had carelessly and negligently nailed and fastened platform of said depot, and as a part of the floor same, a plank of some two inches in thickness,

was raised above the remainder of the floor about two inches, and constituted an obstruction thereon. Plaintiff, when he got off said moving train for orders, as aforesaid, did not see said plank so raised above the remainder of the floor of said platform, and did not know that the same was there, and after he stepped off said train and took a step or two, he caught his foot upon said plank, and by it, without fault or negligence on his part, was caused to stumble and fall, and was thrown down upon the defendant's said railroad track, and, without fault or negligence on his part, was run over by said moving train, causing the loss of both his legs and other injuries described.

After averring how he was injured, plaintiff says said accident and his injuries therefrom were wholly caused by, and the direct result of, the carelessness and negligence of defendant in constructing and repairing the floor to its said depot platform as aforesaid; and plaintiff says that his getting off said train while the same was in motion in no way or manner contributed to said accident, or to his injuries resulting therefrom; that when he got off of said train and stepped upon the platform, he alighted upon his feet safe and all right, and took several steps upon the same, when he struck the projecting plank, which caused him to fall, with results as aforesaid. Plaintiff was wholly without fault or negligence on his part, and knew nothing of the dangerous condition of said platform as above set out, and had not been warned or informed by defendant of its said condition, although defendant well knew its condition as above set out, and knew that the same was dangerous.

The second paragraph differs from the first mainly in the averment that plaintiff was required by the conductor to alight from the train in motion.

In the third paragraph it is averred that it was plain-

tiff's duty to get off the train while it was in
and that he did so acting in the discharge of his

The fourth paragraph charges negligence in
the plank upon the platform, and further states th
and snow had fallen the night before, with whi
platform was covered, and by which it was rendere
and unsafe, and on account of the sleet and sn
plank plaintiff was injured.

The demurrers having been overruled, an ans
general denial was filed.

The jury trying the case returned the followi
vict:

"We, the jury, find for the plaintiff, and ass
damages at the sum of ten thousand dollars."

With their verdict the jury returned answers to t
two interrogatories, requested by the appellee. Th
swers to interrogatories show:

(1, 2) That, at the time he was injured, the
lant was, and had been for three years and a h
brakeman for the appellee.

(3) That when the appellant alighted from the
and received his injuries the train was running at
ten to fifteen miles an hour.

(4) That at the time of the injury there was a c
among the brakemen on the appellee's road, to
from the train while in motion to receive train o
and that the appellant at the time knew of the cu

(5, 6) That at said time there was a custom ad
by the freight conductors of the road, requiring the
brakeman to alight from moving trains to receive
orders, and that the appellant knew of such custon

(7) That at said time there was a custom amon
brakemen to alight from the train while in moti
receive train orders, and that the appellant at the

knew of the custom, and in accordance therewith did alight from the train while in motion.

(8) That at said time there was a custom adopted by the freight conductors requiring the front brakeman to alight from a moving train to receive orders; that the appellant knew of such custom, and at the time he was injured was attempting, in accordance therewith, to alight from a moving train to receive orders.

(9, 10, 11, 12, 13) That at said time there was ice and sleet upon the platform, formed that morning; that the appellant could have known of this ice and sleet, that it was plainly to be seen by one riding on the steps of the engine, and that just before alighting he did know that it was there.

(14) That the fact that the appellant alighted from the engine while the same was in motion contributed or helped to bring about the injury complained of.

(15) That if the appellant had alighted from the train while standing still, and at the point in the platform where he did alight from the moving train, the cleat would not have caused him to fall and receive his injuries.

(16) That the fact that the appellant alighted from the engine while it was in motion, and the further fact that the platform was icy, did not contribute to or help to bring about the injury complained of.

(17) That if appellant had exercised ordinary care in alighting he could not have seen the cleat over which he stumbled.

(18) That one could see said cleat at a distance of four or five feet.

(19) That there was something to prevent appellant from seeing the cleat if he had looked in that direction.

(20) That the custom among brakemen to alight from trains to get orders, was not authorized by any printed

rules of appellee's, but arose from the habit and p
of the trainmen themselves.

(21) That at the time the appellant was injur
conductors of freight trains were required by the r
rules of the company to receive orders from th
graph operators for the movement of their trains.

(22) The finding of the jury is upon the first
paragraphs of the complaint.

Counsel for appellee select interrogatories 14, 1
16, and the answers thereto, as authorizing the
ment in favor of the appellee, notwithstanding th
eral verdict in favor of the appellant.

The complaint alleged that the injury to the app
resulted from the negligence of the appellee in nai
plank or cleat two inches thick upon the platform
depot, against which cleat the appellant, withou
on his part, stumbled and fell under the moving

It is negligence to lay upon an ordinary sidewa
obstruction consisting of a plank two inches
against which travelers may stumble. *Glantz* v.
of South Bend, 106 Ind. 305; *George* v. *City of I*
hill, 110 Mass. 506.

It is greater negligence to place such an obstru
upon a depot platform, where passengers may be h
ing to or from the cars, or where trainmen may be
ing rapidly to execute the orders of their superic
attend to their other duties in connection with m
trains. The only question, therefore, is, whether
der the allegations of the complaint, the appellan
guilty of contributory negligence in alighting upo
platform to receive orders from the telegraphic oper
for the movement of his train.

He alleges in his complaint that he was not negli
in stepping off the moving train upon the platfor
procure the train orders. He also states facts to

a physical fact the getting off the train necessarily to bring about the result. Neither in the compl in the answers to the interrogatories is contribut ligence alleged or shown in the act of alighting f train. Many acts contribute or help to bring abou accident that occurs; but it is only those acts th negligence on the part of those concerned that considers.

Even if it can be said that the act of alightin the train was a concurring cause of the accide as we have seen, this act was without negligence in strict obedience to the requirements of app duties. But it has often been held by the courts, two or more causes combine to bring about an and the injured party is not to blame for any causes, but the other party is to blame for one o of them, then he will be liable for the result.

If, therefore, we had only the complaint to c in connection with the answers to the fourteen fifteenth interrogatories, we should find no conflict this was the mind of the jury, we can see further answer to the sixteenth interrogatory, from which pears that the alighting from the train, and the fact that the platform was icy, did not contribute to bring about the injury complained of. The e meaning of this is that the getting off the train upon an ice-covered platform, was not an act of gence for the reason that in so doing the appellan but in the exercise of his obligations to the com The very best that could be said of those three an to interrogatories, on the theory of the appellee, i they are contradictory, and destroy one another, le all the other answers to the interrogatories in fa the appellant. But we believe these three also c harmonized with the remaining interrogatories and

the complaint, as we have shown, and it is our duty to so harmonize them if it can be done.

But we have as yet said nothing of the general verdict in favor of the appellant. It is, however, the rule that no intendments are to be indulged in favor of answers to interrogatories, but that every intendment is to be indulged in favor of the general verdict. The general verdict is the deliberate and final conclusion to which the jury arrives after taking the whole case into consideration. This conclusion must not be disregarded unless the jury has also found certain facts which are in irreconcilable conflict with the general verdict. The jury has in this case found no such irreconcilable facts, but, on the contrary, a fair and reasonable interpretation of all the answers to interrogatories shows, as does the verdict itself, that the appellee was guilty of gross negligence, and that the appellant was, without his fault, and while in the diligent exercise of his duties to his employer, grievously injured for life, and rendered totally unfit to earn his daily bread.

We think that the court erred in rendering judgment for the appellee on the answers to the interrogatories propounded to the jury.

The judgment is reversed, with instructions to render judgment in favor of the appellant upon the general verdict.

Filed June 5, 1894.

On Petition for a Rehearing.

Howard, J.—The appellee asks for a rehearing, and also for a modification of the mandate in this case. No reason is given to show that the original opinion is not correct, except such reasons as have been already held insufficient.

It is contended that on reversal the mandate should

have been to order a new trial, and not for ju
The opinion shows that the appellant was ent
judgment on the answers to interrogatories. Su
fact that there was also a general verdict in hi
does not weaken his right to judgment.

Had the general verdict been for the appellee
motion were made for judgment for the appellar
the answers, notwithstanding the verdict, that
as we have seen, should have been sustained.
pellant's rights less because the verdict is for hi
if it had been against him? Should judgment be
him solely for the reason that the general verdict
jury is in his favor?

This case is unlike that of *Shoner* v. *Pennsylvan*
130 Ind. 170, upon which counsel rely. In that
was held that the general verdict involved a findi
the injured man was free from contributory
gence; and the court found that the answers to
rogatories were reconcilable with the verdict.
not appear that the facts found in the answers to
rogatories in that case entitled him to judgment.
court, therefore, went as far as it was proper in or
a new trial.

The decision there turned on the reconciling
answers with the verdict. Here the facts foun
within the issues, show absence of contributory
gence, and of themselves entitled appellant to judg
without reference to the general verdict.

The petition and motion are overruled.

Filed September 25, 1894.

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161 326

No. 17,163.

THE INDIANA IMPROVEMENT COMPANY *v.* WAGNER ET AL.

NEW TRIAL.—*Exception to Ruling on.—When Sufficiently Made to Appear in Record.—Supreme Court Practice.*—Where an exception to the overruling of a motion for a new trial appears in that part of the transcript where the order book entry of the motion and the ruling thereon are found, but no such exception appears in the bill of exceptions, where the motion and order overruling it are also found, an exception is sufficiently made to appear to entitle the appellant to have the questions involved in the motion for a new trial considered and decided.

SAME.—*Evidence.—Affidavit.—Clerical Error.*—A ground for a new trial, that the court erred in receiving in evidence, over appellants objection, the affidavit of G. is unavailing where no such affidavit was put in evidence; and the fact that on the page to which the brief refers, the affidavit of M. is found, and G. appears as the notary public before whom the affidavit was made, does not justify the court in treating it as a clerical error.

EVIDENCE.—*Objection to.—Town.—Incorporation Proceeding.—Census and Affidavit.*—Where in a proceeding to incorporate a town, objection was made to the introduction in evidence of the census and affidavit thereto, "for the reason that there is no proof except the affidavit attached," the objection does not include the affidavit, but is an objection to the introduction of the census without additional proof of its correctness.

SAME.—*Objection to Should be Specific.—Confined to on Appeal.*—Grounds of objection to evidence must be stated particularly, and if the evidence is received over such objection, the objecting party will be confined to such objection on appeal.

SAME.—*Proceeding to Incorporate a Town.—Preliminary Steps Admissible on Appeal to Circuit Court.*—The preliminary steps and jurisdictional facts made to appear before the board of commissioners, in a proceeding to incorporate a town, may be made to appear in the circuit court on appeal.

SAME.—*Introducing Transcript on Appeal.—Not Prejudicial Error.*—Where the transcript of a case on appeal in the circuit court was introduced in evidence, there was no prejudicial error.

SUPREME COURT PRACTICE.—*Ground for New Trial can not be Made Independent Assignment of Error.*—No question is saved to the admission of affidavit in evidence over objection, where such alleged error was not made a ground of motion for a new trial.

The Indiana Improvement Company *v.* Wagner *et*

MUNICIPAL CORPORATION.—*Town.—Unplatted Land in Limits.—Validity of Incorporation.*—The fact that unplatted ing land is included in the limits of an incorporated tow render the incorporation invalid.

From the Steuben Circuit Court.

J. E. Rose, for appellant.

J. A. Woodhull, *W. M. Brown* and *N. W. Gi* appellees.

McCABE, J.—The appellees applied to the I Commissioners of Steuben county to incorporate of Hudson, in said county.

Such proceedings were had before the boa the territory described in the petition of the a was duly incorporated by the said board as the Hudson. The appellant appealed to the circuit the county, where there was a trial, finding, an ment, as we construe the record, confirming the of the board of commissioners in incorporating t of Hudson over appellant's motion for a new trie

The only valid assignment of error is the ove of appellant's motion for a new trial.

This record presents another instance of a tota gard of rule 31 of this court on the part of the ap The record is much confused and difficult to und at best, and that confusion is added to by the fa appellant's counsel to place marginal notes on th script, as required by said rule. This cause havi advanced at the request of appellee, on account important public interests involved, furnishes th reason why we do not dismiss the appeal for app failure to comply with the rule.

Attorneys who bring their clients' causes to thi on appeal have not discharged their whole duty t clients and to this court when they take out a tra

of the record from the clerk of the trial court, assign error thereon, file the same in this court, and brief the case trusting wholly to such clerk that the transcript has been properly made up. Before filing it in this court, appellant's attorney ought to carefully examine the same with a view of having the clerk correct any inaccuracies there may be in it, eliminate all repetitions and confusion, and then prepare the record for the appeal as required by the rules of this court.

None of these requirements have been observed in making up this transcript and preparing it for the appeal.

The motion for a new trial appears in two places in the transcript. Once in the order-book entries of record as appears in the transcript, and once in the bill of exceptions. The bill of exceptions is not the proper place for such motion.

An exception to the overruling of the motion for a new trial appears in the order-book entry of the motion, but no such exception appears in the bill of exceptions, where the motion and order overruling it are found. It is well settled that to raise any question involved in a motion for a new trial there must be an exception entered on the record to the ruling of the court in overruling the same. *Henley* v. *McNoun*, 76 Ind. 380; *Fletcher* v. *Waring*, 137 Ind. 159, and numerous cases there cited.

Appellee's counsel contend that it nowhere appears in the record, that appellant excepted to the overruling of the motion for a new trial. But, as it appears in that part of the transcript where the order-book entry of the motion and the ruling thereon are found, that there was an exception to the action of the court in overruling the motion for a new trial, we are of opinion that appellant is entitled thereby to have the questions therein involved considered and decided.

Section 4314, R. S. 1894 (R. S. 1881, sectio
provides that: "Persons intending to make ap
for the incorporation of a town, as hereinafter
shall cause an accurate survey and map to be
the territory intended to be embraced within th
of such town. Such survey shall be made by
tical surveyor, * * * the accuracy of which
and map shall be verified by the affidavit of s
veyor, written thereon or annexed thereto."

Section 4315 (R. S. 1881, section 3294), provi
"Such person shall cause an accurate census to
of the resident population of such territory, a
be, on some day not more than thirty days, pre
the time of presenting such application to th
* * as hereinafter provided; which census s
hibit the name of every head of a family
within such territory on such day, and the nu
persons then belonging to every such family;
shall be verified by the affidavit of the person ta
same."

Section 4316 (R. S. 1881, section 3295), provic
"Such survey, map, and census, when comple
verified, as aforesaid, shall be left at some cor
place within said territory, for examination b
having interest in said application, for a perio
less than twenty days."

Section 4317 (R. S. 1881, section 3296), p
That "Such application shall be by petition, subsc
the applicants, and also by not less than one-thir
whole number of qualified voters residing within s
ritory; and said petition shall set forth the bou
thereof, the quantity of land embraced according
survey, and the resident population therein con
according to said census taken; and the said
shall have attached thereto, or written thereupc

davits verifying the facts alleged therein; and it shall be presented at the time indicated in the notice of such application, or as soon thereafter as the board can receive and consider the same."

Section 4318 (R. S. 1881, section 3297) provides that: "The board, * * in hearing such application, shall first require proof, either by affidavit or by oral examination of witnesses before them, that the said survey, map, and census were subject to examination in the manner and for the period required by section 3 of this act [section 3295]; and if said board be satisfied that the requirements of this act have been fully complied with, they shall then make an order, declaring that such territory shall, with the assent of the qualified voters thereof, as hereinafter provided, be an incorporated town, by the name specified in the application, * * * and they shall also include in such order a notice for a meeting of the qualified voters resident in said territory, at a convenient place therein, to be by them named, on some day within one month therefrom, to determine whether such territory shall be an incorporated town."

The succeeding sections provide for the holding of the election, and if a majority of the voters favor the incorporation, on the report of that fact to the commissioners, who, if they are satisfied of the legality of the election, shall make an order declaring that said town has been incorporated, etc.

The first point made by appellant for a reversal is the introduction in evidence over appellant's objection of the affidavit of Frank Howard to prove the correctness of the census. The offer was to put in evidence the census of the resident population of the territory and the affidavit attached thereto. The appellant objected "for the reason that there is no proof except the affidavit attached." That is not an objection to the introduction

of the affidavit in evidence, but it is an objectio introduction of the census without additional pr correctness to that of the affidavit. Appellant gues that the affidavit was incompetent evidenc

A party who objects to evidence must state the of his objection particularly, and if the eviden ceived over his objection he must, on appeal court, be confined to such specific objection. not, in this court, urge any other objection, valid such new objection may be. *Torr* v. *Torr*, 118; *Mugg* v. *Graves*, 22 Ind. 236; *Blasingame ingame*, 24 Ind. 86; *Schenck* v. *Butsch*, 32 In *Clem* v. *Martin*, 34 Ind. 341; *Leffler* v. *Rice*, 44 I *Farman* v. *Lauman*, 73 Ind. 568; *Grubbs* v. *Mor* Ind. 166; *Bundy* v. *Cunningham*, 107 Ind. 360.

The next point urged is that the trial court receiving in evidence, over appellant's objecti affidavit of Newton W. Gilbert to prove the accura survey and map. We find no such affidavit in ord. On the page to which appellant's brief r for such affidavit we find the affidavit of Frank the surveyor of the county, verifying the correct the survey and map. The name of the notary before whom the affidavit was made, was New Gilbert. This we might regard as a mere clerical appellant's brief but for the fact that it appears th way in the motion for a new trial. It does not the admission in evidence of any affidavit of Fra ers, but does assign as one of the grounds there reception in evidence of the affidavit of Newton bert. As there was no such affidavit put in ev that ground of the motion for a new trial is unav

The next point made for a reversal is that th court received in evidence, over appellant's objecti affidavits of John W. Wagner, Alva J. Kimm

other facts are required to be verified by aff tached to or written on the papers mention quoted sections. The correctness of the map a and census is required to be verified by affid ten thereon or annexed thereto. But the these papers at a convenient place within the for examination for the required length of time of itself which does not consist of any writing But it was such an act as the Legislature thoug to be supported by proof, as in the case of the or facts mentioned in the statute. So it was that such act or fact might be proven either by or oral examination of witnesses. The only re provision was not expressly extended to the o liminary acts or facts to be proven was that it ready been provided that those things might by affidavit.

The cause on appeal must be tried *de novo* ir cuit court. *Scraper* v. *Pipes*, 59 Ind. 158.

No good reason is perceived why these prelimin and jurisdictional facts may not be made to a the circuit court on the same kind of proof that missible before the board of commissioners.

The next point made by appellant is that court erred in allowing the appellee to introduc dence on the trial the transcript of the record b board of commissioners, filed in the circuit cour appellant in taking the appeal from the orde board in establishing the incorporation. This re already before the court, and the introduction th evidence was a harmless error. *Fulton* v. *Cu* 132 Ind. 453; *Bennett* v. *Meehan*, 83 Ind. 566; *Marsh*, 124 Ind. 18; *Indianapolis, etc., R. W. Bush*, 101 Ind. 582; *Manor* v. *Board, etc.*, 137 I *School Town of Monticello* v. *Grant*, 104 Ind. 16

No. 16,890.

The Board of Commissioners of Henry Coun v. Gillies.

County Commissioners.—*Contract for Stationery.—Admini —No Appeal from.*—The act of the board of county cor in entering into a contract for the purchase of statior county is an administrative one, from which an appeal

Same.—*Contract for Stationery, When Void.—Injunction.*— forming such act, the board fails to comply with the re of the statute, the act of the board is void, and it may be and injunction will lie to prevent the board from carry terms of such contract.

Same.—*Void Contract.—Injunction.—Estoppel.—Stationery* that the plaintiff, in an injunction proceeding against tl commissioners and other defendants to restrain them f any action under such void contract, and to have such c clared void, had endeavored to become a bidder before on such contract, could not prevent him from bringing a a taxpayer, for the purposes aforesaid.

Same.—*Contract for Stationery.—Must be Made in Strict with the Letter and Spirit of the Statute.*—In making a c stationery for the county, the statements required of the ficers, the notice to bidders, and the reception and exan bids are the essence of the law governing such transactic board must exercise their powers in this regard in strict c with the letter and spirit of the statute.

From the Henry Circuit Court.

J. H. Mellett and *M. E. Forkner*, for appellar

D. W. Chambers, for appellee.

Howard, J.—The appellee, a citizen and tax the county of Henry, filed his complaint in tl below, to have a certain contract which had been into between the appellant Board of Commissior the appellant Elliott declared void, and to h pellants and other defendants restrained from any action thereunder.

The judge of the Henry Circuit Court deeming himself disqualified, appointed the Honorable D. W. Comstock, Judge of the 17th Judicial Circuit of Indiana, to try the case.

From the finding of facts by the court, it appears that on December 7, 1891, being the first day of the December term, 1891, of the Board of Commissioners of Henry County, Indiana, the said board, while in regular session, accepted a bid in writing, made by the appellant Elliott, and entered into a contract with him, by the terms of which the said Elliott agreed to furnish to said county the records, blanks, and stationery of all kinds for the use of the county, for one year at rates named in said bid and contract, and also to do the public printing for the county at twenty per cent. less than the legal rate; that prior to the making of said contract no statement had been made to said board by any county officer of said county, of the probable amount and quantity of books, stationery and other articles necessary for conducting the business of his office for any determinate period, nor had said board requested such statement of any officer; nor did said board give notice in any manner that bids would be received for furnishing supplies needed for the use of the county or its officers; that on said day, and before the said commissioners had determined to enter into a contract with the appellant Elliott, they had knowledge that the appellee desired, and was ready, to file a bond to furnish said records, blanks, and stationery, and do the printing needed by said county for the year 1892, and that the firm of Burford & Co., a responsible firm doing business at Indianapolis, Indiana, also were ready, and desired, to bid to furnish the records, blanks, and stationery needed by said county for said year; that prior to the awarding of said contract, said commissioners were informed that

the appellee had a bond for the faithful performance of the contract if awarded to him, and that he then and there had his said bid and bond ready to file; that with said knowledge, said board awarded said contract to appellant Elliott without examining or considering any other bid than said Elliott's; that after said board, on said day, announced to the appellee that the bid of Elliott had been accepted, and the contract awarded to him, and before the order awarding said contract had been recorded and signed on the minutes of said board, and before the appellant Elliott had been informed of the acceptance of his said bid, the appellee filed with the auditor of said county, the bid which he had informed the board he desired to file before the announcement had been made of the acceptance of the bid of Elliott, and with said bid filed a bond in the sum of two thousand dollars to secure the faithful performance of the contract for the public printing, which bond the court finds was ample to secure that part of the contract, and which was the only bond proposed to be filed by the appellee; that in said bid the appellee proposed to furnish all the records, blanks, blank books, and stationery for the use of the county that might be required during the period of one year from the acceptance of said bid, at the rates named in said bid, and also to do the public printing for the county for said year for sixty per cent. less than the bid of Elliott; that at the same date the said firm of Burford & Co. proposed in writing to furnish all blanks, blank books, and stationery necessary for the use of the several officers of said county for one year from said date for ten per cent. less than the appellant Elliott.

The bid of the appellant Elliott, and also that of the appellee, Gillies, are set out in full detail in the finding, and it appears that the prices named in appellee's bid

average from twenty to sixty per cent. lower than those in Elliott's bid.

The court made further findings showing absence of collusion or fraud on the part of appellants; that the prices stated in Elliott's bid were reasonable; that Elliott and the appellee were resident newspaper publishers and were of opposite politics, Elliott being of the same politics as the members of the board; that the appellants were threatening to carry out the contract entered into, and would do so unless restrained by the court; and that appellants, in entering into said contract, did not intend to defraud the taxpayers of Henry county.

As conclusions of law, the court found that that part of the contract which provided for furnishing records, blanks and stationery was illegal and invalid, and that the appellee was entitled to have the same canceled and its performance enjoined, and that that part of the contract which provided for the public printing was legal and valid.

As the court found that the appellee proposed to do the public printing for sixty per cent. less than the bid of the appellant Elliott, it does not at first appear clear why the court concluded, as a matter of law, that the printing part of the contract was legal and valid.

There is, however, no law requiring the board of county commissioners to let the public printing to the lowest bidder. The board might, therefore, lawfully let the printing to Elliott at any price not greater than the legal rate, even though appellee offered to do it for sixty per cent. less.

Both parties, and the court also, proceeded upon the theory that the action was brought, and that all the proceedings in relation to the contract were had, under provisions of the act of 1875, providing that all contracts for the purchase of stationery and other articles for the

use of county officers, not including public printing, shall be made by the board of commissioners as in that act specified. Acts 1875, Reg. Sess., p. 31.

Although the act in question has not been brought into the Revised Statutes, there is no doubt that it is in full force and effect, and was so at the date of the contract, as assumed on the trial. *Evans, Aud.*, v. *Browne*, 30 Ind. 514; *Bender* v. *State*, 53 Ind. 254; *Board, etc.*, v. *Burford*, 93 Ind. 383.

Section 1 of said act makes the county board the purchasing agent of the county, for the purchase of all the books, stationery and the other articles necessary for conducting the business of the county offices, circuit court and inferior courts of the State.

Section 2 requires every county officer using articles purchased at the expense of the county, to make known, under oath, at the December term of the commissioners' court, the probable amount and quality of books, stationery and other articles necessary for conducting the business of his office for one year.

Section 3 provides that the commissioners, after an examination of such statements, shall order the purchase of all or any part of the articles set forth in such statements, if they believe they are necessary for the use of the county, and, also, are articles that should be paid for by a general tax.

Section 4 directs that, after deciding upon the amount and kind of articles they should purchase, the commissioners shall give notice for at least ten days that they will receive bids for furnishing the supplies demanded, giving specifications of the kind, quality and quantity of articles needed, and that they will give the contract for furnishing them to the lowest responsible bidder, reserving the right to reject all bids.

Section 5 declares that if any necessity should exist, in

their judgment, for the purchase of any one or more articles before the time of the annual statements of the county officers, or if the supply should become exhausted at any time between such annual statements of the county officers, the commissioners may purchase a sufficient amount of such articles as may be necessary to last until the next meeting aforesaid, for making annual contract for official supplies, at the lowest possible prices.

Counsel for appellants confine their discussion of the alleged errors of the court to three propositions:

1. That the plaintiff had his remedy by appeal, and having such remedy an injunction does not lie.

2. That the plaintiff, having appeared before the board and sought to obtain the contract, he is now estopped to deny the legality of the proceedings, or to raise any question as to the notice.

3. That the board acted within the legal limits of its powers as the purchasing agent of the county, under the law of 1875; that that statute is directory and not mandatory in its provisions, and that the action of the board being within the powers given in the act and in the furtherance of the intent and policy of the act, it is valid and not void.

The case of *Platter* v. *Board, etc.*, 103 Ind. 360, was one in which the county commissioners had made a contract for the sale of county property, and the action was to set aside the contract of sale. It was there held that no right of appeal would lie, the act of the board not being a judicial one; that the right of appeal does not exist where the board acts in a purely ministerial or administrative capacity.

So in *City of Valparaiso* v. *Gardner*, 97 Ind. 1, it was said that "the execution of a contract is a ministerial act, and if the contract is one in excess of the corporate authority its execution may be enjoined." In the same

case it is said: "A taxpayer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract. *Sacket* v. *City of New Albany*, 88 Ind. 473; *City of Madison* v. *Smith*, 83 Ind. 502; *Noble* v. *City of Vincennes*, 42 Ind. 125; Dillon Munic. Corp. (3d ed.), section 922."

The question in the case before us was, whether the board was authorized by law to enter into the contract for the purchase of stationery, etc., for the county. The making of this contract by the board was not a judicial act, but simply an administrative one in which the board had discretion to enter into the contract or refuse to do so. No appeal will lie from such an act of the board. But if the statute prescribed the mode of exercising this administrative power, and the board failed to comply with the requirements of the statute, then the act of the board was void, and it may be so declared, and injunction will lie to prevent the board from carrying out the terms of the void contract. Appellee pursued the proper remedy.

There is no principle of estoppel in the case. The appellee instituted the action as a taxpayer, as he had a right to do. The fact that he had endeavored to become a bidder before the board, could not prevent him from bringing an action as taxpayer to test the right of the board to enter into a contract against the express provisions of the statute.

The third proposition advanced by counsel is, that the statute is directory and not mandatory, and that the intent and policy of the act have not been violated. If the position here taken were tenable it would amount to a total abrogation of the law in question. That statute requires that statements should be filed with the board by the several county officers, showing the supplies

needed. The court finds that no such statements were filed, and that none were requested by the board. The statute requires, further, that ten days' notice should be given bidders for supplies. The court finds that no notice was given. The statute also requires that bids should be received for supplies. The court finds that appellee's bid and that of Burford & Co. were not received or examined by the board. The statements by the officers, the notice to bidders, and the reception and examination of the bids, are the essence of the law. If these are disregarded as being merely directory, the statute disappears. The statutes of the State are not to be wiped out in that manner. Boards of county commissioners are themselves but the creatures of the Legislature, and they must pursue and exercise their powers in strict compliance with the letter and spirit of the statute. It is theirs to obey, not to disregard, the commands of the law-making power of the State.

There is no merit whatever in this appeal. Indeed, although the court found that there was no intentional fraud on the part of the board, yet it would seem, from an inspection of the finding of facts by the court, that the board was utterly regardless of the interests of the taxpayers of the county in their refusal to receive the bids offered, and in entering into a contract which they knew would cost the people of the county a much larger amount than the same goods might be obtained for through the offered bids.

The judgment is affirmed.

Filed Sept. 18, 1894.

No. 16,770.

DOWELL *v.* THE TALBOT PAVING COMPANY.

CONSTITUTIONAL LAW.—*When Question duly Presented.—Appellate Court Jurisdiction.*—Where a constitutional question is so pertinent to the record and presented by counsel in such apparent good faith supported by argument, that the court naturally feels it to be a duty to pass upon and decide the question one way or the other, the constitutionality of the statute is in question, and duly presented within the meaning of the statute, Acts 1893, p. 30, exception 1.

SAME.—*When Question not duly Presented.—Appellate Court Jurisdiction.*—But if the statute, the constitutionality of which is thus assailed, is not material to the determination of the appeal, and the case may be decided and finally determined without deciding such constitutional question, then the constitutional question is not presented within the meaning of such statute.

STATUTE CONSTRUED.—*Street Improvements.—Contractor.—Lien.—Foreclosure.*—The amended seventh section of the act of 1889, as amended by the act of 1891, conferring the rights on the contractor for street improvements to foreclose his lien, and to recover a reasonable attorney's fee, did not impair any vested right or constitutional guaranty. It simply provided a remedy for the enforcement of a right which had already been created by the act of 1889, in conferring a lien on the contractor.

SAME.—*When Statute Retrospective.—Remedial Statute.—Street Improvements.—Act of 1891.*—The statute conferring such rights on the contractor being a remedial statute relating to the mode of procedure in the enforcement of a right, is retrospective, and applies to causes of action subsisting at the date of its passage.

SPECIAL FINDINGS.—*Amendments, When May be Made.*—Amendments to special findings by the court may be made by the trial court during the term and before the rendition of the judgment.

From the Wells Circuit Court.

L. Mock, L. B. Simmons, H. Brownlee, H. J. Paulus, D. H. Fouts and *A. M. Waltz*, for appellant.

J. Morris, R. C. Bell, J. M. Barrett and *S. L. Morris*, for appellee.

McCABE, J.—Appellee sued appellant, in the Blackford Circuit Court, to foreclose a lien on certain lots owned

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by appellant in the town of Hartford City, in the county of Blackford, for street improvements on Washington street, on which appellant's lots bordered and abutted.

A trial by the court resulted in a special finding of the facts, on which conclusions of law were stated by the court. Pursuant to the conclusions of law, the court, over a motion for a new trial, rendered a judgment and decree in favor of appellee for the total amount of the cost of such improvement, $741.11, and $100.00 attorney's fee, which was distributed proportionately on each of the three lots against which the cost of the improvement had been assessed, according to the amount on each.

The errors assigned call in question the sufficiency of the facts stated in the complaint, the conclusions of law, the action of the court in overruling the appellant's motions for a new trial and in arrest of judgment, overruling appellant's motion for judgment in his favor on the facts found, in making new findings of facts and adding the same to the original facts found by the court, in striking out the original conclusions of law and rendering new ones, in refusing to modify the decree, in refusing a jury trial, and in refusing to add to the special finding of facts the facts requested by the appellant.

It is expressly conceded by the appellant's learned counsel that the same question is presented on the special finding and conclusions of law that is presented on the assignment that the complaint does not state facts sufficient to constitute a cause of action, and we may add that of the motion in arrest of judgment. Under such circumstances, it is not material to examine into the sufficiency of the complaint. *Haskett* v. *Maxey*, 134 Ind. 182.

The facts essential to a determination of the questions involved in the conclusions of law, as shown by the special finding, are that on and prior to June 4, 1890, Hart-

ford City was, and still is, an incorporated town; that on that day the board of trustees of said town, in regular session, deeming it necessary to improve Washington street, in said town, from the east line of Gadbury's addition to the tracks of the Pittsburgh and Chicago Railway, therein declared, by resolution, the necessity therefor, providing therein the kind, size, location and terminal points of such improvement; that due notice was given to the property-owners, and after a hearing given to such owners, said board, on July 2, 1890, at a regular session, by a vote of more than two-thirds, duly ordered said street to be graded and paved with cedar blocks, and to be curbed with stone curbing, according to the plans and specifications then and there adopted and filed with the clerk of said town; that said work was to be done by contract; that due and proper notice was given by publication for three weeks in a newspaper published within said town for sealed proposals for doing said work; that plaintiff filed its bid in accordance with said notice, it being the lowest and best bid for said work; that said board, at a regular meeting, on August 2d, 1890, let said work to plaintiff; that the resolution ordering the work to be done provided that the costs should be collected from the real estate adjoining and bordering on said improvement, and thereupon plaintiff and said town entered into a written contract for the making of said improvement pursuant to said bid; that plaintiff completed said work, and at a regular meeting of said board it found and determined that said work had been done and completed according to the terms of said contract, and thereupon caused a final estimate of the total cost thereof under said contract to be made by the town engineer in accordance with section 6 of chapter 118 of the Acts of 1889, p. 242; that after the filing of the report of the town engineer as to the cost of said improvement, said board caused two weeks' notice to the

property-owners affected to be given by publication in two newspapers representing the two political parties casting the largest number of votes at the last general election, printed and published in said town of the time and place when and where a hearing would be had upon such report before a committee appointed by such board to consider such report; that at the time and place mentioned in such notice the committee met and heard all objections by property-owners desiring to offer objections, and all persons aggrieved; that said committee reported back to said board that said report of the town engineer be amended in some slight particulars; that certain pieces of real estate bordering on said improvement had been accidentally omitted from said report that should be placed in said estimate, and that the total cost of said improvement was $29,877.51; that the average cost per running foot of the whole length of that part of said street so improved was $3.237, and stating in said report the name of each property-owner on that part of the street so improved, and also that the number of front feet owned by the respective property-owners on said part of said street was 8,103.

Also setting out in said report the amount of the cost for said improvement due upon each lot or parcel of ground respectively, giving the full description, together with the owner's name of each lot or parcel of ground bordering on said street so improved. The defendant was assessed therein the amount hereinafter stated against the property hereinafter mentioned; that said report was true in every particular; that said board, at a regular meeting thereof, held on January 7th, 1891, having found said committee's report, and the proposed estimate reported by them, to be just, true, and legal, confirmed, approved, and adopted said report, and then and there assessed against the various lots and parcels of

ground therein set forth the amounts which should be assessed against the same on account of said improvement, and caused said assessments to be placed upon the town tax duplicate and charged against said lots and parcels of ground therein described; that the defendant was on June 4th, 1890, up to and including the time of making the assessment, and still is, the owner of the lots which are described as lot 1 in block 23 in the original plat of said town, lot 2, in block 25 in said original plat of said town, and a strip of ground 34 feet off the west side of lot 4, block 24, in said original plat of said town, and that all of said real estate adjoins, borders and fronts on said improvement; that lots 1 and 2 each adjoin and front on said improvement to the width of 60 feet; that said strip fronts, borders and joins said improvement to the width of 34 feet; that said board, at said last mentioned meeting, assessed against said lot 1, for and on account of said improvement, $194.22, and against lot 2, for the same purpose, assessed $194.22, and on the strip on said lot 4 aforesaid, for the same purpose, assessed $110.06, all of said assessments being in accordance with said estimate and report; that said amounts so assessed against said real estate were obtained by multiplying the number of front feet on said improvement of each lot by the average cost price per running front foot; that said assessments are past due and wholly unpaid, and defendant had refused and still refuses to pay the same; that said defendant has failed and refused to request the issuance of bonds therefor as provided in said chapter 118; that the plaintiff, the Talbot Paving Company, is a corporation; that said town of Hartford City never at any time issued any certificates or bonds to the plaintiff in this cause as provided for in section 9 of said chapter 118, and no part of said defendant's real estate is unplatted lands; that the defendant failed, neglected,

and refused to pay said assessment, and failed, neglected and refused to file any waiver for the purpose of obtaining the right of paying said assessments in installments; that a reasonable attorney's fee for the collection of all of said assessments is $100, and that the same should be apportioned and assessed against said several tracts or parcels of ground in proportion to the number of front feet of each abutting on said improvement.

The conclusions of law stated are: 1. That the plaintiff is entitled to recover in this action a reasonable attorney's fee, amounting to the sum of $100, which should be apportioned and assessed against said several lots or parcels of ground in proportion to the number of front feet of each abutting on said improvement. 2. That the plaintiff has and holds a valid lien upon each of said lots 1 and 2, in blocks 23 and 25, respectively, in the original plat of said town, for the sum of $249.77, and holds a lien upon said strip of lot 4, for the sum of $141.57, and is entitled to have said lien foreclosed.

The objection to the complaint and to the second conclusion of law is that the act approved March 8, 1889, did not authorize the contractor to foreclose the lien or maintain a suit to enforce payment of the cost of the improvement and for an attorney's fee.

The third section of the act provides that the city or incorporated town shall be liable to the contractor for the contract price for said improvement, and the owners of the property bordering on the improvement shall be liable to the city or town for their proportion of the costs thereof, and such city or town and contractor shall have a lien on such property for its proportion of the costs of such improvement, and in case such city or town shall neglect to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates mentioned may foreclose such lien or liens

and recover, in addition to the principal, interest, and costs, a reasonable attorney's fee.

Section 8 provides for the issue of street or sewer improvement bonds to raise money to pay for such improvements, and when issued shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise under the provisions of this act.

Section 9 provides for the issuance of certificates or bonds to contractors in payment for their work on such improvements under their contracts, and that such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of said city or town in such assessment and lien against the property of such owners assessed as shall avail themselves of the provisions of the act to pay their assessments in installments, and shall authorize such contractor and his assigns to sue for and collect every such assessment embraced in any such certificate or bond by any of the methods provided by law, including the provisions of the act; and in case such city or town shall neglect to pay or promptly collect any such assessments when due, the owner of any such certificate or bond may foreclose the lien thereof, and, in addition to the principal and interest of such bonds or certificates, shall recover a reasonable attorney's fee, with costs.

The first section provides that such city or town may bring an action to foreclose such lien as a mortgage, and shall recover, in addition to the amount thereof and costs, a reasonable attorney's fee.

The appellant contends that as there is no finding that any certificates or bonds were issued under the provisions of the act, either to appellant as contractor or to others,

and assigned to him, the finding is insufficient to support the conclusions of law that appellee is entitled to recover. It is conceded that the incorporated town would have been entitled to foreclose the lien for the amount of appellant's proportion of the cost of the improvement of Washington street therein and costs of suit, and, in addition thereto, an attorney's fee. But it is contended that there is no authority in the act for the appellee to maintain the suit for any purpose whatever.

It must be admitted that there is no such express provision in the act itself. But the third section, as we have seen, expressly provides that the contractor shall have a lien upon the abutting property, for the value of such improvement. This manifestly means the amount of the contract price. To give the contractor a lien on the abutting property, without any power or authority, either express or implied, to make it available, or enforce it, would, to say the least of it, be a great oversight on the part of the Legislature. That the manifest intent was to confer the lien on the contractor, no one for a moment can doubt; but that they intended to so confer it, and, at the same time, withhold all remedy to the contractor to enforce and make it available, may admit of very serious doubt. The lien given to the city or town is only for its benefit in case it advances the money to pay for the improvement. When it collects the money before such advancement, it does so, not for itself, but as agent of the interested parties. *Quill* v. *City of Indianapolis*, 124 Ind. 292.

But section 10, prior to the amendatory act hereinafter to be noticed, provides, among other things, that whenever the owner or owners of any lot or lots, the assessments against which is or are embraced in any certificates or bonds in the act mentioned, shall severally

promise or agree in writing in consideration of having the right to pay his or their assessments in installments, that they will not make any objection to illegality or irregularity as to their respective assessments, and will pay the same with interest, he or they shall have the benefit of the provisions of the act authorizing the payment of assessments in annual installments. It then provides that: "Any owner of any lot or lots assessed for payment of the cost of any such improvement, who will not promise and agree in writing as herein provided, shall be required to pay his assessment in full when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act."'

The amendatory act of March 6, 1891, amended sections 4, 7 and 10 of the act of 1889, in important respects, and though it went into effect on the day of its passage, it was not passed until after the work was done, and the final estimate and assessment against the lots in question were made, and the lien had attached. Acts of 1891, p. 323 (2 R. S. 1894, section 4288). Section 10 is so changed by the amendatory act as that it now only applies to cities.

But amended section 7, Acts 1891, p. 324, provides that, "the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of such assessment, with interest, all costs, and a reasonable attorney's fee." We are met with the objection from the appellant, that the amended section 7 can not apply to this case, though it was passed before the suit was begun, because to so apply it would be to give it a retrospective effect; and it is contended that all statutes must be given a prospective, and not a retroactive effect,

unless their provisions point clearly and strongly to a contrary intention. It was held by this court, and we think correctly, in *Nicklaus* v. *Conkling*, 118 Ind. 289, that statutes will not be given a retrospective operation unless the language employed imperatively requires it. And that statutes will not be given a retroactive effect so as to change existing rights, unless the language employed is such as to compel courts to that course.

But this court held in the *Connecticut Mut. Life Ins. Co.* v. *Talbot*, 113 Ind. 378, that "The better rule of construction, and the rule precisely applicable to remedial statutes, however, is, that a statute must be so construed as to make it effect the evident purpose for which it was enacted, and if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty."

Appellant also contends that the amendatory act violates the constitution of the United States. His learned counsel on that subject say in their brief, that "The contract between the appellee and the town of Hartford City * * under the law then in force, and under which the improvement was begun and carried to completion (Acts of 1889), fixed the amount the appellant was to pay for the construction of said work, and said contract further provided how and by whom said assessment should be collected. The language of the contract is this: 'That upon the completion of said work, said town shall cause to be issued due and legal estimates against the lots and parcels of ground bordering upon the line of said work, and the certificates and bonds provided for in said law, and do such other things as may be necessary for the collection of said assessments.' So it will be seen that the contract between the

parties makes it the duty of the town to collect said assessments, as well as to fix the amount the appellant was to pay, and the appellee was to receive for said work; and we submit that it was not within the power of the General Assembly of 1891 to change and modify the contract between the parties and add $100 for the use and benefit of the appellee. * * * And it seems it was the intention to raise the assessment, and make it higher than it was in the first instance, for he states in his conclusions of law that said sum (attorney's fees of $100), should be apportioned to, and assessed against said several lots or parcels of ground in proportion to the number of front feet of each abutting on said improvement. The effect of such legislation would be in violation of the tenth section of the first article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. *Bronson* v. *Kinzie*, 1 How. *311.

"Impairment of the obligation of a contract may be either by discharging one of the parties from the fulfillment of its terms, or it may be by adding to the burdens imposed upon the obligor, and making its conditions more favorable to the obligee." Wade on Retroactive Laws, section 115.

It is this contention, and the contention that the amendatory act, if allowed to operate retroactively, impairs vested rights, that alone, if at all, takes this appeal out of the exclusive jurisdiction of the Appellate Court.

The act approved March 4, 1893, p. 356, provides "That in addition to the jurisdiction which the Appellate Court now possesses, that court shall have jurisdiction in all cases for the foreclosure or enforcement of liens of purely statutory origin where the amount in controversy does not exceed the sum of $3,500."

It was provided in the then existing law, Acts 1893, p.

30, that "the Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute, federal or State, or the validity of an ordinance of a municipal corporation is in question and such question is duly presented."

In *Benson, Admr.*, v. *Christian*, 129 Ind. 535 (537), it was said, by ELLIOTT, J., speaking for the court: "Where there is enough in the argument of counsel to fairly indicate that they sincerely believe that a constitutional question is involved, and also to supply fair reason for that belief, this court must assume jurisdiction, but there must be argument indicating such belief, and stating reasons for it, as bald assertions will go for nothing. Where there are arguments, and not mere assertions, the court must presume that counsel are sincere, and, presuming this, decide the question made by their argument in cases where the record presents it. Courts are bound to assume that counsel will not discredit their profession by insincere arguments. * * Acting upon these presumptions and considerations, we shall decide the questions arising upon the contention that the statute providing for recovering fees illegally exacted is unconstitutional."

And we may add to the foregoing statement of the rule, that when the argument of counsel contending that a statute material to the determination of the case is unconstitutional, is, in addition to the qualities required by the rule just quoted, so pertinent to the record and presented by counsel in such apparent good faith that the court would naturally feel it to be a duty to pass upon and decide the question one way or the other, then the constitutionality of a statute is in question and duly presented within the meaning of the statute just quoted. But if the statute, the constitutionality of which is thus assailed, is not material to the determination of the ap-

peal, and the case may be decided and finally terminated without deciding such constitutional question, then the constitutionality of a statute is not in question within the meaning of the Appellate Court act.

It follows, from what we have said, that the validity and constitutionality of the 7th section of the act of 1889, as amended by the amendatory act of 1891, is material to the determination of this appeal. Because, if it is valid and is to stand, it is the only warrant in law that appellee had to maintain the suit in its own name to foreclose its lien for the contract price of the work it had done. And, on the other hand, if it violates the constitution, for any of the causes or reasons assigned by appellant, it must fall to the ground, and the judgment be reversed.

We are of opinion that the case has been brought within the rule laid down as to the constitutionality of a statute being in question and duly presented. It appears that the question of the validity and constitutionality of said amended section 7 are material to the determination of this appeal; and that appellant's contention and argument that it is unconstitutional, are sufficiently pertinent to the record and plausible, and seem to be made in such entire good faith that we feel it a duty to decide the question.

We therefore hold that the Appellate Court has no jurisdiction, and that the jurisdiction of this appeal is in this court. But we are of opinion that the amended 7th section of the act of 1889, in conferring the right on the contractor to foreclose his lien and to recover a reasonable attorney's fee, did not impair any vested right or constitutional guaranty. It simply provided a remedy for the enforcement of a right which had already been created by the act of 1889 in conferring on the contractor a lien. That act had already made the abutting property liable to a lien in favor of the city, the contractor, and the

holders of certificates or bonds issued under the act on account of street improvements for the contract price of such improvements, and had conferred the right on the city and on the holders of such certificates or bonds to maintain a suit to foreclose the lien as a mortgage and to recover an attorney's fee therein.

As we have already seen, the right given the city and the holders of the bonds or certificates to foreclose and recover attorney's fees was for the benefit of the contractor. The extension of the remedy to the contractor did not create any new right, nor did it impose a new burden on the abutting property. Such property was already subject to that burden, subject to foreclosure and attorney's fees. The Legislature may, without a violation of the constitution, provide for a cumulative and more speedy remedy than the existing one. *Maynes* v. *Moore*, 16 Ind. 116; *Webb* v. *Moore*, 25 Ind. 4; *Jones* v. *Hopkins*, 26 Ind. 450.

And may, likewise, provide a remedy where none existed. *Sparks* v. *Clapper*, 30 Ind. 204.

The contention of appellant is to the effect that this remedy could not be extended by the Legislature so as to affect cases where, as here, the contract for the improvements had been completed, and the lien for the same had attached under the act of 1889 before its amendment. In other words, that both the rights and remedies of the parties must remain unchanged. That the amendment may be valid when applied to future street improvements, but can not be when applied to past ones, because it impairs vested rights. This assumption is based on the idea that the appellant had a vested right that the remedies provided against him should remain unchanged.

It has often been held that there can be no vested right in remedies, provided they are not so changed as

to be rendered nugatory, and hence it is that whatever belongs to the remedy merely is within the control of the Legislature, subject only to the limitation that an adequate and reasonable mode of enforcing the right must remain or be provided, which leaves the value of the contract without substantial depreciation or impairment. *Davis* v. *Rupe*, 114 Ind. 588; *Robertson* v. *Vancleave*, 129 Ind. 217; *Tennessee* v. *Sneed*, 96 U. S. 69; *Wolff* v. *New Orleans*, 103 U. S. 358; *Bryson* v. *McCreary*, 102 Ind. 1.

The extension of the remedy to the real party in interest, the contractor, did not take away or impair any right the appellant had, nor did it add any burden to which he was not already subject. He was already subject to the lien against his property and to the right of the city to foreclose the same, with attorney's fees, for the benefit of the contractor. We, therefore, hold that the amendatory act did not impair any vested right or constitutional guaranty.

The question remains whether the amendatory act can be given a retrospective effect so as to enable appellee to maintain the action.

It has been held by this court that retrospective curative statutes may be passed under the constitution when they do not interfere with vested rights. *Johnson* v. *Board*, *etc.*, 107 Ind. 15.

The amendatory act was curative in its nature, and, as already said, as it did not interfere with vested rights, it may be given a retrospective effect. Moreover, it relates to the procedure, and it is a well recognized rule of construction that statutes relating to the procedure or remedy, such as relate to the course and form of proceedings for the enforcement of a right, and do not affect the substance of the right, and neither directly nor indirectly de-

stroy all remedy for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage are valid. Sedgwick on Stat. Con., p. 163; Endlich Int. of Stat., sections 287, 288.

But aside from all these considerations, the amended section 7, *supra*, by clear and explicit language, shows that it was intended to and does relate to assessments made before its passage. Its language is: "Any owner of any lot who has been assessed, * * * who will not promise, * * * and all other owners of lots or parcels wherein assessments, * * * have been made, or have heretofore been made against any one lot or parcel, * * * and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed, * * * and shall recover in addition to the amount of such assessment, with interest, all costs, and a reasonable attorney's fee."

When the Legislature employs the language, "assessments which have heretofore been made," it clearly and undoubtedly refers to assessments which had been made before the passage of the amendatory act; and such assessments are authorized by it to be foreclosed by the contractor.

The trial court, therefore, did not err in its conclusion of law that the plaintiff was entitled to have its lien foreclosed. The alleged errors of refusing appellant a jury trial, and overruling his motion for a new trial, are not discussed in appellant's brief, and are, therefore, deemed waived.

It appears from the record, that after the court had announced its special finding and conclusions of law, and the same had been partly entered of record, the clerk was ordered by the court to proceed no further with the entry

thereof on the record until the further order of the court; that thereupon the appellant moved the court to modify and change its special finding by adding thereto a large number of facts in addition to those contained in the special finding as announced. The appellee also filed a motion asking the court to add other and different facts and make certain modifications in the conclusions of law. Appellant's motion was overruled and the appellee's motion was sustained, and certain facts were added to the special finding, the most important and material of which was that relating to the attorney's fee.

All the cases in this court, holding that such amendments can not be made to a special finding after the same has been filed, and during the term, were overruled by this court in *Thompson* v. *Connecticut Mutual Life Ins. Co.*, 38 N. E. Rep. 796. This court held, in the case last cited, that such amendments may be properly made by the trial court during the term and before the rendition of the judgment. There was, therefore, no error in making such amendments.

The motion to modify the judgment asked simply to strike out the allowance for attorney's fees, not that such fees were not amply supported by the evidence and within the issues, but because they could not be recovered by the appellee under the law. What we have already said concerning the validity of the statute providing for such fees on foreclosure of the lien by the contractor disposes of the question against the appellant.

We find no available error in the record, and therefore the judgment is affirmed.

DAILEY, J., did not participate in this decision.

Filed Oct. 12, 1894.

No. 16,964.

STATE, EX REL. CROWDER, ET AL. *v.* MILES ET AL.

STREETS AND ALLEYS.—*Mode of Improvement can not be Controlled by Mandamus.—Incorporated Town.*—The board of trustees of an incorporated town have exclusive power over the streets and alleys of the town, with power to improve the same, and the manner of improvement being discretionary with the board of trustees, their discretion as to the mode of improvement can not be controlled by mandamus.

SAME.—*Incorporated Town.—Power of Board of Trustees to Change Grade of Sidewalk.*—The board of trustees of an incorporated town has the right to change the grade of a sidewalk at any time before the work is completed, in such manner as in their judgment would make the walk most beneficial to the public.

From the Sullivan Circuit Court.

O. B. Harris, *W. T. Douthitt* and *A. G. Smith*, Attorney-General, for appellants.

J. T. Hays, *W. C. Hultz* and *W. R. Nesbit*, for appellees.

COFFEY, J.—This action was brought by the appellant, in the Sullivan Circuit Court, against the appellees, who constitute the board of trustees of the town of Sullivan, to compel them, by mandate, to construct a sidewalk according to specific plans and specifications.

The facts in the case, as gathered from the pleadings, as we understand them, are that about 1891 the board of trustees of the town of Sullivan, by proper ordinance, settled upon a plan for grading and improving certain of the streets in the town, among which was Jackson street. Under the plan adopted, Jackson, Court, and Section streets were graded and graveled. Court street and Section street run north and south, while Jackson runs east and west, crossing Court and Section streets at right angles. Lots eighty-two and eighty-three front on

the south side of Jackson street and extend from Court street on the east to Section street on the west, a distance of two hundred and sixty feet. In front of these lots is a good brick and stone walk, placed there by the owner under the direction of the town authorities, and in front of lot eighty-two is a number of large and valuable shade trees. After the grading of the streets above named, it was ascertained that it would destroy the shade trees in front of lot eighty-two to construct the sidewalk on Jackson street on the grade as it was then fixed by the ordinance for the improvement of that street, and when this fact was ascertained a large number of the citizens and resident taxpayers of the town petitioned the board of trustees to change the grade of the sidewalk so as to save the shade trees. The board granted the prayer of the petition, and sent out the engineer to fix a new grade for the sidewalk on Jackson street so as to preserve the shade trees thereon, but before he made his report the writ in this case was served upon the appellees, by which the appellant sought to compel them to construct the sidewalk on the grade as established by the ordinance directing the improvement.

To a return setting forth these facts, the court overruled a demurrer, and the appellant, refusing to plead further, judgment was rendered for costs.

The controlling question in the case relates to the right and power of the trustees of the town to change the grade of the street, when once established, before the completion of the improvement contemplated.

Section 3367, R. S. 1881, confers upon the boards of trustees of incorporated towns in this State exclusive power over the streets, alleys, highways and bridges within the corporate limits of the town, and gives them power to prescribe the height and manner of construction of such bridges, and to lay out, survey and open

new streets and alleys, and straighten, narrow, widen, grade and gravel and otherwise alter and improve the streets and alleys.

The exclusive power over the streets and alleys of the town, with power to improve the same, necessarily carries with it a discretion in the board of town trustees as to the kind of improvements to be made and the manner in which the work shall be performed. *Mayor, etc.*, v. *Roberts*, 34 Ind. 471; *City of Kokomo* v. *Mahan*, 100 Ind. 242; *Weaver* v. *Templin*, 113 Ind. 298.

It is a familiar rule that an inferior tribunal, clothed with a discretion, can not be compelled by mandamus to exercise such discretion in any particular way.

Where such tribunal is charged with the performance of some specific duty, in the performance of which there is a discretion, if it refuses to act at all mandamus is the proper remedy to put it in motion, but the court issuing the writ can not control the exercise of such discretion. 14 Am. and Eng. Encyc. 108.

In this case, however, the board of trustees of the town of Sullivan was not refusing to act. It was, in fact, taking the necessary steps to so change the grade of the sidewalk on Jackson street so as to save the shade trees thereon. Of course, if the writ in this case had been made peremptory, their power to make such a change would have been at an end, for they would have then been compelled to construct the sidewalk on the grade as originally established. They would have thus been deprived of the discretion with which the statute invests them.

We think the board had the undoubted right to change the grade of this sidewalk at any time before the work was completed, in such manner as in their judgment would make the walk most beneficial to the public. To deny it this right would be to deprive it of the power to

correct any errors or mistakes in a grade once established, however injurious to the public they might be.

We think the return filed by the appellees in this case was good, and that the circuit court did not err in overruling a demurrer thereto.

Judgment affirmed.

Filed Oct. 16, 1894.

No. 16,881.

Louisville, Evansville and St. Louis Consolidated Railroad Company *v.* West, Treasurer, et al.

From the Gibson Circuit Court.

J. E. Iglehart and *E. Taylor*, for appellant.

A. G. Smith, Attorney-General, *M. W. Funk*, *W. D. Robinson*, *W. M. Land*, *J. B. Gamble*, *H. Kramer*, *L. B. Osborn*, *E. DeBruler*, *W. W. Freand*, *J. T. Beasley* and *A. B. Williams*, for appellees.

Hackney, C. J.—This suit was by the appellant against the appellees, James A. West, treasurer of Gibson county; James F. Saunders, treasurer of Vanderburg county; J. F. Masters, treasurer of Warrick coanty; J. T. McKenney, treasurer of Spencer county; J. Burger, treasurer of Dubois county; O. O. Smith, treasurer of Pike county; Michael Eberhard, treasurer of Perry county; F. P. Walz, treasurer of Crawford county; Patrick Griffin, treasurer of Harrison county; Levi H. Scott, treasurer of Floyd county; J. A. Jones, marshal of the city of Rockport, Spencer county; Jacob H. Atkins, treasurer of the town of Bird's Eye, Dubois county; Charles Tillery, treasurer of the town of English, Crawford county; D. Vanderpool, treasurer of the city of Cannelton, Perry county; Jacob Best, treasurer of the city of New Albany, Floyd county; Arnold H. Miller, treasurer of the city of Huntingburg, Dubois county; August Mernenger, treasurer of the city of Tell City, Perry county; and John McDonough, treasurer of the city of Evansville, Vanderburg county.

The complaint was to enjoin the enforcement of certain taxes assessed upon valuations of appellant's railroad and rolling stock, made by the State Board of Tax Commissioners pursuant to the act of March 6, 1891, Acts 1891, p. 199; R. S. 1894, section 8408 *et seq.*

The lower court sustained the demurrer of the appellees to the complaint, and that ruling is the only assigned error.

The questions presented in this case are as to the powers, duties and privileges of said board, and as to the constitutionality of said

act, and are identical with those considered and decided in *Cleveland, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 625; and, as confirmed by the Supreme Court of the United States on —— day of May, 1894.

Upon the authority of the cases cited, the judgment of the circuit court is affirmed, and the restraining order, heretofore issued by this court herein, is dissolved.

Filed June 20, 1894.

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No. 16,915.

CONZMAN, TREASURER, ETC., *v.* TERRE HAUTE BREWING COMPANY.

From the Vigo Circuit Court.

A. G. Smith, Attorney-General, and *S. R. Hamill*, for appellant.

COFFEY, J.—The legal question involved in this case, is the same as the principal question involved in the case of *Jones, Treas.*, v. *Rushville Nat'l Bank*, 138 Ind. 87, and upon the authority of that case, the judgment rendered herein is affirmed.

Filed May 29, 1894.

No. 16,993.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD COMPANY *v.* SAWVEL, TREASURER, ET AL.

From the Porter Circuit Court.

J. H. Collins, *W. H. Dowdell* and *A. C. Harris*, for appellant.

A. G. Smith, Attorney-General, *W. Ransburg* and *A. L. Jones*, for appellees.

HACKNEY, C. J.—The appellant sued the appellees Reuben Sawvel, treasurer of DeKalb county; Joseph M. Shew, treasurer of Noble county; John M. Runyan, treasurer of Kosciusko county; Franklin G. Romaine, treasurer of Elkhart county; George H. Storer, treas-

urer of St. Joseph county; Arthur D. Senour, as treasurer of Marshall county; Allen W. Reynolds, treasurer of Porter county; S. S. Bosserman, treasurer of LaPorte county, and Thomas McCay, treasurer of Lake county. The lower court sustained a demurrer to the complaint, and that ruling presents the only error assigned. All the questions here presented were fully considered and decided in *Cleveland, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 625, and confirmed by the Supreme Court of the United States May —, 1894. The questions so decided involved the powers, duties and procedure before the State Board of Tax Commissioners and the constitutionality of the tax law of March 6, 1891, Acts 1891, p. 199; R. S. 1894, section 8408 *et seq.*

Upon the authority of the cases cited, the judgment of the circuit court is affirmed, and the restraining order, heretofore issued by this court herein, is dissolved.

Filed June 20, 1894.

No. 16,883.

The Evansville and Indianapolis Railroad Company *v.* West, Treasurer et al.

From the Gibson Circuit Court.

J. E. Iglehart and *E. Taylor*, for appellant.

A. G. Smith, Attorney-General, *J. T. Beasley*, *A. B. Williams*, *W. D. Robinson*, *W. Hickam*, *W. W. Ireland* and *S. R. Hamill*, for appellees.

Hackney, C. J.—This suit was by the appellant against the appellees James A. West, treasurer of Gibson county; James F. Saunders, treasurer of Vanderburg county; J. F. Masters, treasurer of Warrick county; O. O. Smith, treasurer of Pike county; R. J. Barr, treasurer of Daviess county; John French, treasurer of Greene county; W. F. Cassady, treasurer of Owen county; Ernest Muehler, treasurer of Clay county; Gus A. Conzman, treasurer of Vigo county; T. G. Murdertown, treasurer of the city of Washington, Daviess county; W. W. Hauck, treasurer of the city of Terre Haute, Vigo county, and John McDonough, treasurer of the city of Evansville.

The lower court sustained a demurrer to the complaint, and no other ruling is assigned as error.

The questions presented by the record are the same as those decided in the cases of *Cleveland, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co.* v. *Backus, Treas.*, 133 Ind. 625; and confirmed by the Supreme Court of the United States on the —— day of May, 1894.

Carroll *v.* Talbot Paving Company.

Upon the authority of those cases, the judgment of the circuit court is affirmed, and the restraining order, heretofore issued herein by this court, is dissolved.

Filed June 20, 1894.

No. 16,926.

Werber *v.* Talbot Paving Company.

No. 16,927.

Hubbard *v.* Talbot Paving Company.

No. 16,928.

Clouser *v.* Talbot Paving Company.

No. 16,929.

Rhodes *v.* Talbot Paving Company.

No. 16,930.

Amsden *v.* Talbot Paving Company.

No. 16,931.

Covault *v.* Talbot Paving Company.

No. 16,932.

Briscoe et al. *v.* Talbot Paving Company.

No. 16,933.

Wheeler *v.* Talbot Paving Company.

No. 16,934.

Clouser *v.* Talbot Paving Company.

No. 16,935.

Carroll *v.* Talbot Paving Company.

No. 16,936.

Henley *v.* Talbot Paving Company.

No. 16,937.

Thomas *v.* Talbot Paving Company.

No. 16,938.

Hubbard *v.* Talbot Paving Company.

From the Wells Circuit Court.

L. Mock, *L. B. Simmons*, *H. Brownlee*, *H. J. Paulus*, *D. H. Fouts*, and *A. M. Waltz*, for appellant.

J. Morris, *R. C. Bell*, *J. M. Barrett* and *S. L. Morris*, for appellee.

Hackney, C. J.—In the above entitled cases, the appellee sued the several appellants to enforce liens against the lots of said several appellants for the improvement of a part of Washington street, in the town of Hartford City, upon which improvement said several lots abutted. All of the questions involved in any one of said cases, were presented and determined adversely to the appellants by this court, in the case of *Dowell* v. *Talbot Paving Co.*, 138 Ind. 675. Upon the authority of that case the judgments, severally, in the above entitled cases are in all things affirmed.

Dailey, J., did not participate in the consideration of these cases.

Filed Oct. 31, 1894.

No. 17,332.

Williamson *v.* The State, ex rel.

From the De Kalb Circuit Court.

C. M. Phillips, for appellant.

A. G. Smith, Attorney-General, and *J. Butler*, Prosecuting Attorney, for appellee.

Coffey, J.—This was a prosecution by the State against the appellant, Norris Williamson, under the statute providing for surety of the peace. A trial of the cause by a jury resulted in a verdict in favor of the State, upon which the court, over a motion for a new trial, rendered judgment, and required the appellant to enter into bond to keep the peace.

Hauck Treasurer, etc., *v.* First National Bank of Terre Haute.

The appellant assigns as error, in this court, that the circuit court erred in overruling his motion for a new trial.

The only question presented for our consideration, relates to the sufficiency of the evidence to support the verdict of the jury.

We have carefully read the evidence in the cause, and while we find that it is not as satisfactory as could be wished, it can not be said it does not tend to support the verdict. There is evidence in the cause tending to support every material charge in the affidavit upon which the prosecution rests. Its weight was wholly for the jury. We can not disturb the verdict on the weight of the evidence.

Judgment affirmed.

Filed Sept. 19, 1894.

No. 16,912.

138 700
141 137

Hauck, Treasurer, Etc., *v.* First National Bank of Terre Haute, Indiana.

From the Vigo Circuit Court.

A. G. Smith, Attorney-General, *S. R. Hamill* and *P. M. Foley*, for appellants.

J. Jump, *J. E. Lamb* and *J. C. Davis*, for appellee.

Coffey, J.—The question involved in this case, is identical with the principal question involved in the case of *Jones, Treas.*, v. *Rushville Nat'l Bank*, 138 Ind. 87, and upon the authority of that case, the judgment in this case is affirmed.

Filed May 29, 1894.

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ter the transcript herein was prepared and certified, and was then attached to the transcript by counsel; that the precipe for the transcript did not require him to include a bill of exceptions, and that he is unable to identify the bill in the transcript as that which was filed in his office, and believes it not to be the same; and affidavits are filed with and made a part of the return, alleging that the longhand manuscript is not the same which was prepared and certified by the stenographer, but, without authority, has been amended since prepared and filed,—the appellate tribunal can not require the clerk to amend his certificate, as doubts exist as to the identity of the bill, and the court must treat the record as not containing such bill.

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4. *Contract for Stationery.—Must be Made in Strict Compliance with the Letter and Spirit of the Statute.*—In making a contract for stationery for the county, the statements required of the county officers, the notice to bidders, and the reception and examination of bids are the essence of the law governing such transaction, and the board must exercise their powers in this regard in strict compliance with the letter and spirit of the statute. *Ib.*

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Setting Aside Final Settlement.—Partnership.—Judgments.—Payment by Partner.—Subrogation.—Pleading.—Parties.—Misjoinder of Causes of Action.—Motions to Make Specific.—A complaint by S. to set aside an administrator's final settlement alleged that S., I., and

W., the decedent, were partners until the latter's death; that upon the death of W. the firm was indebted in the sum of $4,000; that during the administration of W.'s estate judgments aggregating more than $3,000 were rendered against the estate and S. and I., upon said indebtedness; that all the assets of the firm had been exhausted in paying other indebtedness; that W. left property, real and personal, to the value of $10,000, with no debts except those of the firm, and that his heirs, the other defendants, took, and have since held, possession of said property; that the administrator refused to pay any part of the judgments, and S. was compelled to pay the same to protect his own property; that intending to prevent the plaintiff from filing a claim against the estate for the sums so paid, the administrator had filed and procured the approval of a final settlement report, without any showing that the judgments had been paid and without paying them; that the plaintiff and the judgment creditors had no actual knowledge or notice of the filing or approval of said report, and were not present in court. While there were incidental allegations as to subrogation, the only relief granted was the setting aside of the report.

Held, That there was no error in overruling the motion to make the allegations as to the property left by the decedent, and as to the exhaustion of the firm's assets, more specific.

Held, also, That there is no harmful misjoinder of causes of action. (Section 341, R. S. 1881.)

Held, also, That I. was not a necessary party to the action.

Held, also, That the complaint is good as against a demurrer for want of facts.

Held, also, That the payment of the judgments by the plaintiff did not extinguish them, but that, under the statute (sections 1214 and 1215, R. S. 1881), they remained in force for the benefit of S.

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1. *Conveyance to School Township for School Purposes.—Implied Condition.—Reversion.— Title.*—Where land is conveyed by warranty deed to a school township, "for the use of the common schools," without any expressed condition, there is no implied condition by which the property would revert to the grantor, upon a mere nonuser of the same for school purposes, the title being as good as could be made to a school township.

Newpoint Lodge, No. 255, Free and Accepted Masons v. *School Town of Newpoint*, *141*.

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4. *Construction by Parties.—When will not Prevail.— Common Schools.*—A construction placed on a deed by the parties, where it is a conveyance to a school township, for the use of the common schools, will not prevail over the plain terms of the deed which is in strict compliance with the statute. *Ib.*

5. *Conveyance to Grantee's "Heirs."—When Void for Uncertainty.*—A deed purporting to convey real estate "to Francis Carrico's heirs," Francis Carrico being alive, is, in the absence of words showing that the grantor intended the term "heirs" to mean "children," void for uncertainty, and upon the death of the grantor, without further alienation, the real estate descends to his heirs. *Booker* v. *Tarwater*, 385

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Defect of Parties Defendant.—Failure to Designate Proper Parties.—Waiver.—Where a demurrer on the ground of defect of parties defendant does not designate the proper parties, the demurrer is insufficient in form, and the objection is thereby waived. *State, ex rel.*, v. *McClelland, Tr.*, *395*

DESCRIPTION.

See REAL ESTATE, 1, 2; TAXES, 9.

1. *Real Estate.—Omission of State.—Parol Evidence.—Judicial Notice.*—Where the description of land is complete in every respect, except the county and State wherein the land is situated, are omitted, the description being by section, township and range, the court takes judicial notice that there could be but one such description in this State, the fact that the land is located in this State, may, under proper averments in the complaint to that effect, be proven by parol. *Tewksbury* v. *Howard*, *103*

2. *Deed.—Conveyance.—Real Estate.—"South Line of Street."—"North Line of the Railroad Track."*—In a deed of conveyance was the following description: "Beginning on a line dividing the northeast quarter of section 15, township 20, range 10 east, at a point ranging with the south line of Adams street, Muncie; thence south with said quarter section line to the north line of the 'railroad track;' thence eastwardly far enough to make three acres by a line from thence north to a point running with said street aforesaid, and therewith westwardly to the place of beginning." Questions: (1) Where is the starting point of the description, in the south line of the street as it then was (45 feet wide), or in the south line, as shown by the recorded plat (60 feet wide)? (2) What was the terminus of such line on the south, designated by the words "north line of the railroad track?"

Held, (1) that the starting point of the description was in the south line of the street as established by the recorded plat.
Held, (2) that such line terminated at the north rail of the railroad track, the terms "railroad track" and "railroad right of way" having separate and distinct meanings.
Held, also, that when anything exists to meet the call, an ambiguity can not exist. *Reid* v. *Klein*, *484*

3. *When can not be Varied by Extrinsic Evidence.*—Where there is no equivocation in the language of a description, and there are present objects, monuments, lines, streets or places answering the call in the deed, no ambiguity exists, and the rule applies that the effect of a written instrument can not be varied by extrinsic evidence. *Ib.*

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2. *Complaint, Sufficiency of.*—Where the complaint alleges certain facts quite generally, which, upon motion, might have been made more specific, but others are specific as to acts of cruelty, the complaint can not be held insufficient. *Ib.*

3. *Residence, How Established.—Statutory Requirement Indispensable.—Judicial Notice.—Sufficiency of Evidence.*—Where residence is proven by several witnesses, only two of whom appear to be freeholders, the residence of one of such freeholders not being disclosed, and the residence of the other being given as "Bainbridge, Monroe township," the court will take judicial notice that the latter was a resident freeholder of this State, but can not do so as to the former; and as proof of residence, as required by the statute, can not be dispensed with, the evidence was not sufficient to sustain a finding for plaintiff. *Ib.*

DRAINAGE.

1. *Ditch, When Not Constructed According to Plans and Specifications.—Commissioner's Report.—Rejection.*—Where the plans and specifications and the order of the court require that a ditch be so constructed that the banks may have one foot of slope for every foot of depth, and that the dirt removed from the ditch should be placed at least two feet from each bank, and given a slope of one foot to each foot in depth, the construction of the ditch with perpendicular banks, and the dirt removed being placed at the required distance but not being given the required slope, is not a construction according to the plans and specifications and the order of the court; and under such a state of facts, the report of the drainage commissioner that the ditch had been constructed according to the plans and specifications should be rejected. *Racer* v. *Wingate*, *114*

2. *Special Finding.—Conclusion of Law.—Construction According to Order of Court.*—The finding of the court "that such open ditch, as constructed, has been completed by the contractor," does not show that the work has been done according to the plans and specifications, or according to the order of the court, and is not, therefore, sufficient to authorize a conclusion of law that the commissioner is entitled to a judgment approving his report. *Ib.*

3. *Judicial Notice.*—The court takes judicial notice of the purpose of plans and specifications for the construction of a ditch, requiring the banks to be given a certain slope. *Ib.*

4. *Commissioner's Report.—Exceptions.—Quære.*—Could the fact that the ditch, as constructed, is as beneficial to those assessed for its payments as it would have been had it conformed to the plans and specifications, be put in issue where exceptions are taken to the commissioner's report that the ditch has been constructed according to law? *Ib.*

5. *Ditch.—Rights of Interested Parties.*—While parties assessed for the construction of a ditch may, if the ditch is not being constructed according to the order of the court, have the contractor and commissioner cited for contempt of court, yet that is not their only remedy. Those interested in the construction of the ditch have the right to assume, up to the time the ditch is completed, that it will be constructed in substantial compliance with the order of the court, and are not compelled to keep watch over its construction. *Ib.*

DRAINAGE COMMISSIONER.

See DRAINAGE, 1, 4.

EASEMENT.

Use of Stairway.—Destruction of Building.—Extinguishment of Right.—A reservation of such a right of way over a stairway and hall as may "be necessary to the proper use and occupancy of the upper story" of a building, does not carry an interest in the soil, and the destruction of the building by fire without the fault of the servient owner, extinguishes the right. *Shirley* v. *Crabb, 200*

EJECTMENT.

See REAL ESTATE, 2.

Recovery.—Issues Formed by General Denial.—Relative Strength of Title. Where the complaint in an action for ejectment is answered only by general denial, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the alleged weakness of his adversary's title.

Silver Creek, etc., v. *Union Lime, etc., Co., 297*

ELECTION.

1. *For Adoption of Proposed Measure.—Majority.—Failure to Vote.—Acquiescence.*—Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.

City of South Bend v. *Lewis, 512*

2. *When Majority of all Votes Required.—Regular Election.*—Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at "such election," a majority of all the votes cast at the election is meant,

and not merely a majority of the votes cast on that particular question. *Ib.*

3. *When Less than a Majority of all Votes Sufficient.*—Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary. *Ib.*

4. *Votes Upon Particular Proposition.—What Required.*—Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote, and that those electors opposed to the proposition shall cast a negative vote, and that a "majority of the votes given" shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved. *Ib.*

5. *Union of City and Town.—Election Upon.—Vote Required.—Statute Construed.*—The act of February 16, 1857, for the union of cities and towns, being sections 3233 *et seq.*, R. S. 1881, requiring the votes of a majority of the qualified voters of each corporation, at a special election held on a day to be fixed by the city and town authorities for the purpose of determining the matter, the result of which is to be specially canvassed and declared, only contemplates a majority of the persons voting upon the proposition for union, and the fact that the day fixed for the election is the day upon which the general municipal election is required by law to be held, and that the votes cast in favor of such proposition do not constitute a majority of the votes cast for municipal officers, does not affect the result. *Ib.*

EMINENT DOMAIN.

See MORTGAGE, 3.

ENTRY, NUNC PRO TUNC.

See JUDGMENT, 8; SPECIAL JUDGE, 2.

ENUMERATION.

See COMMON SCHOOLS, 1, 3.

EQUITY.

See TAXES, 11.

ESTOPPEL.

See COUNTY COMMISSIONERS, 3; LIFE INSURANCE, 1; MARRIED WOMAN; TAXES, 6.

Contract.—Real Estate.—Conveyance.—Waiver.—Where a grantee of real estate procures the conveyance to be made in a manner different from that stated in the contract for conveyance, he can not thereafter object that the contract in that respect was not complied with. *Tewksbury* v. *Howard, 103*

EVIDENCE.

See BILL OF EXCEPTIONS, 2, 3; CONTRACT, 1, 5; CRIMINAL LAW, 1; DESCRIPTION, 1, 3; DIVORCE, 3; HIGHWAY, 2; MASTER AND SERVANT, 6; NEW TRIAL, 2, 3, 9; SPECIAL FINDING, 2; SUPREME COURT PRACTICE, 2, 4; SURETY OF THE PEACE, 4, 6; VARIANCE; VERDICT, 1.

1. *Value of Rents and Improvements.—How Proven.*—Where the facts sought to be elicited are the rental value of lands and the value of improvements, the proper test is, on the one hand, what

was the rent of the place really worth? and, on the other, what is the reasonable value of the improvements made? Not what rent was actually received, and what the improvements cost.
Taylor v. *Calvert*, *67*

2. *Offer to Prove.—Specific Statement.*—An offer to prove will not be available unless the facts sought to be elicited are specifically stated. *Ib.*
3. *Admissibility, When no Question as to is Saved.*—No question as to the admissibility of evidence is saved, where the evidence is not in the record, and no question is shown to have been put to the witness, and no statement is made as to what the witness will testify to. *Wright, Admx.*, v. *Fultz*, *594*
4. *Objection to.—Town.—Incorporation Proceeding.—Census and Affidavit.*—Where in a proceeding to incorporate a town, objection was made to the introduction in evidence of the census and affidavit thereto, "for the reason that there is no proof except the affidavit attached," the objection does not include the affidavit, but is an objection to the introduction of the census without additional proof of its correctness.
Indiana Improvement Co. v. *Wagner*, *658*
5. *Objection to Should be Specific.—Confined to on Appeal.*—Grounds of objection to evidence must be stated particularly, and if the evidence is received over such objection, the objecting party will be confined to such objection on appeal. *Ib.*
6. *Proceeding to Incorporate a Town.—Preliminary Steps Admissible on Appeal to Circuit Court.*—The preliminary steps and jurisdictional facts made to appear before the board of commissioners, in a proceeding to incorporate a town, may be made to appear in the circuit court on appeal. *Ib.*
7. *Introducing Transcript on Appeal.—Not Prejudicial Error.*—Where the transcript of a case on appeal in the circuit court was introduced in evidence, there was no prejudicial error. *Ib.*

EXCEPTION.

See DRAINAGE, 4; NEW TRIAL, 8; WATERWORKS COMPANY, 1, 2.

EXECUTION.

Levy.—Lien.—Continuance Beyond Life of Execution.—Special Finding.—Presumption Supporting.—A special finding that an execution issued by a justice of the peace was levied upon personal property, and that the levy continued for a period longer than six months prior to the issuing of a *vendi*, is a finding of fact, and it will be presumed, in the absence of anything to the contrary, that the evidence supported the finding that the levy, in some legal way, was maintained beyond the life of the original execution, and an exception to a conclusion of law that the lien of the execution continued is not well taken. *Scanlin* v. *Stewart*, *574*

EXPECTANCY.

See WILL, 1.

FEE, CONDITIONAL.

See WILL, 1.

FELLOW-SERVANT.

See RAILROAD.

FORECLOSURE OF MORTGAGE.

See ADMINISTRATOR; STRICT FORECLOSURE.

FORMER ADJUDICATION.

See GUARDIAN AND WARD, 5.

Decree as to Matters Outside the Issues.—Fraudulent Conveyance.—Inchoate Interest of Wife.—When can not be Sold.—Where the only issue presented in a suit as to setting aside as fraudulent as against the husband's creditors a conveyance to the wife, and to subject the land to the payment of the husband's debts, and the court found for the plaintiffs, and in addition to decreeing the conveyance fraudulent and setting it aside and subjecting it to the payment of the husband's debts, the court decreed that the wife's inchoate interest therein be sold and forever barred, that part of the decree relating to the inchoate interest of the wife was outside of the matters submitted to it by the pleadings of the parties is not *res judicata*, and is not conclusive or binding on the parties. *Whitney* v. *Marshall*, 472

FRAUD.

See JUDGMENT, 3.

FRAUDULENT CONYEYANCE.

See FORMER ADJUDICATION.

1. *Husband and Wife.*—A husband who has paid out money for the betterment of his wife's real estate, and who, for the purpose of defrauding her creditors, joins her in making conveyances whereby the title is placed in himself and wife by entireties, can assert no claim thereon as against the creditors sought to be defrauded. *Bunch et al.* v. *Hart et al.*, 1
2. *Complaint.—Recovery.—Necessary Allegations and Proof.*—In an action to set aside a fraudulent conveyance, it must be both alleged and proven, before the plaintiff can succeed, that at the time of the conveyance, and at the time the suit was brought, the debtor did not have enough property left, subject to execution, to pay his debts. *Nevers* v. *Hack*, 260
3. *Insolvency at Time Suit is Brought to Set Aside Conveyance.—Relating Back.—Presumption.*—The fact that insolvency exists at the time suit is brought to set aside a fraudulent conveyance, does not raise the presumption that the insolvency existed prior to that time, and does not extend the insolvency back to the time the conveyance was made. *Ib.*
4. *From Husband to Wife in Accordance to Contract for Certain Purchase-Money.*—Where, at the time of the conveyance of certain land to his wife, A had other property of the value of one thousand dollars, subject to execution, and was surety for B on a note for $500, B having property subject to execution, sufficient to pay all his indebtedness, the conveyance being made to the wife upon agreement by which certain of the purchase-money was furnished,—the conveyance by A to his wife was not in fraud of creditors. *Boyd* v. *Vickrey*, 276
5. *Insolvency at Time of Conveyance and at Time of Bringing Suit.*—Before a conveyance of real estate will be set aside as fraudulent, it must appear that at the time of the conveyance, as well as at the time of bringing the suit, the debtor did not have sufficient other property subject to execution from which the debt could be made. *Ib.*
6. *Real Estate.—Inchoate Interest of Wife.—Land Bought with Husband's Money and Fraudulently Conveyed to the Wife.—Judicial Sale.—Partition.*—Where real estate is bought with the husband's (A's) money and he fraudulently procures the vendor to convey the same to his (A's) wife, if such conveyance be held fraudulent,

and the land subjected to the payment of the husband's creditors, the wife is entitled to her inchoate interest therein, and is entitled to partition of the same when the title in the vendee under the judicial sale becomes absolute. *Whitney* v. *Marshall, 472*

FUGITIVE.

Arrest and Detention Upon Telegram.—Habeas Corpus.—Insufficient Return.—To a writ of *habeas corpus* directed against a police officer and the county sheriff, the defendants made return that the police officer arrested the petitioner and delivered him into the custody of the sheriff for commitment; that he did so upon a telegram from H., the chief of police of Portland, Oregon, to the effect that the latter held a warrant for the petitioner upon a charge of forgery, and directing the arrest; that after the arrest H. sent to the officer, by telegraph, a copy of a warrant issued to and held by H. for the petitioner's arrest; that H. had sent a further telegram that he had started, with proper papers, for the petitioner; that defendants believed the petitioner guilty of said crime, made the arrest in good faith and believed that H. was en route to procure the petitioner's extradition.

Held, that the return is bad. *Simmons* v. *Vandyke, 380*

GRANTOR AND GRANTEE.

See TRUST, 3.

GRAVEL ROAD.

1. *Assessment Lien.—Statute Construed.—Act of 1877.—Act of 1885.* -The provision of the act of 1877, providing that a gravel road assessment shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes, was not qualified or limited by the act of 1885 providing that such lien shall relate to the time of the filing of the petition. *Murphy* v. *Beard, 560*

2. *Assessment Lien.—Senior to Other Ordinary and Pre-existing Liens.*—The lien provided for in such act (act of 1877) is senior to pre-existing and subsequent ordinary liens. *Ib.*

3. *Assessment Lien.—Priority of.—Power of Legislature to So Enact.—Constitutional Law.*—The Legislature has the power to enact that such assessment liens shall take precedence over other pre-existing liens, upon the theory that the improvement enhanced the value of the security. *Ib.*

4. *General Notice.—When Presumed to Have Been Given.—Binding on Mortgagee and Purchaser Under Mortgage.*—The general notice required in a gravel road proceeding, which, in the absence of allegations to the contrary, will be presumed to have been given, is sufficient to bind a mortgagee of the land affected by such proceeding; and the purchaser under such mortgage, after the assessment, is bound by the proceeding which bound the mortgagee. *Ib.*

5. *Proceeding to Establish.—Jurisdiction.—Remonstrance.—Collateral Attack.*—Where, in a proceeding to establish a free gravel road, under sections 6855 *et seq.*, R. S. 1894, all the steps are taken by the board of commissioners necessary to acquire jurisdiction of the subject-matter and of the persons affected, and a judgment is rendered without remonstrance ordering the road to be constructed, any subsequent remonstrance, saving exceptions as to the assessment of benefits, is a collateral attack upon such judgment, and unless the proceedings are void, should be dismissed by the board. *Evans* v. *West, 621*

6. *Using Part of Road Already Constructed.*—A proceeding for the construction of a free gravel road, under sections 6855 *et seq.*, R. S. 1894, is not void because the line of the road, between its terminal points, passes over a part of the line of another road already constructed. *Ib.*

GUARDIAN AND WARD.

See STATUTE OF LIMITATIONS.

1. *Guardian Buying Certificate of Purchase.—When Held in Trust.*—Where it is the duty of a guardian to protect his wards' interest by buying a certificate of purchase, and he makes the investment for himself, he will be held as their trustee, and all benefits derived from such purchase will inure to the benefit of the wards. *Taylor* v. *Calvert*, 67

2. *Guardian Assuming Position Antagonistic to Wards' Interest.—When Held a Trustee.—Reimbursement.*—Wherever a guardian assumes a position in relation to his wards' funds, by which he puts his personal interest in conflict with theirs, or acquires any interest or title adverse to that of his wards, he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards, and he will hold what he has acquired, in trust for them, subject only to his right to be reimbursed for what he has invested. *Ib.*

3. *Mortgage Deed Held by Guardian.—Junior Lien Held by Wards.—Right to Redeem.*—Where a guardian purchases a certificate of sale of lands on a senior lien, on which his wards hold a junior lien, and takes a deed therefor in his own name, in the nature of a mortgage, for the purpose of holding it as additional security for the money advanced by him in the purchase thereof, until such time as he might repay himself out of the funds of his wards, but in his final report and settlement he made mention of the certificate and deed, but took credit for the junior mortgage, which he turned over to his wards, the wards have a right to have the deed to the guardian set aside and to redeem from said sale. The fact that the guardian at no time had sufficient funds of his wards with which to reimburse himself for the purchase-money, could not preclude the wards from redeeming, nor could it defeat a constructive trust. *Ib.*

4. *Right of Wards to Redeem.—Tender of Redemption Money.—Rents and Profits.*—And in such case it is unnecessary to allege that the redemption money was tendered to the guardian, where it is alleged that he has been more than paid by the rents and profits by him received. *Ib.*

5. *Final Settlement.—When does not Preclude Right of Wards to Redeem.—Res Adjudicata.*—In such case, the wards were not precluded from their right to redeem, by the judgment of final settlement, such matter not being involved in the final settlement, and it not being necessary to set aside such report before proceeding to redeem. *Ib.*

6. *Arrangements Between Guardian and Ward Soon after Ward Becomes of Age.*—The conduct and all arrangements between guardian and ward soon after the ward has become of age will be closely scrutinized. *Ib.*

HABEAS CORPUS.

See FUGITIVE.

HARMLESS ERROR.

Sustaining Demurrers to Paragraphs of Answer.—Same Facts Provable

Under General Denial.--Sustaining demurrers to paragraphs of answer is not available error, if error at all, where the same facts are provable under the general denial, which is pleaded.
Tewksbury v. *Howard*, *103*

HIGHWAY.

See GRAVEL ROAD; STREETS AND ALLEYS.

1. *Established on Section Line.—Change of Course to Correspond with Partition Line.*—Where a highway has been established upon a section line, public interests require that the highway should not vary its course to correspond with partition lines, and it matters not upon whose land it is located. *Hawkins* v. *Stanford, Tr.*, *267*
2. *Dedication.—Prima Facie Evidence of.—Recorded Plat.—Street.—Personal Injury.—Incorporated Town.*—In an action against an incorporated town for personal injuries sustained by reason of an obstruction in one of its public streets, the plat of the addition containing such part of the street, which was filed and recorded in the recorder's office for more than sixteen years prior to the accident, is *prima facie* evidence of ownership by the dedicator, and of his intention to so dedicate it.
Town of Fowler v. *Linquist*, *566*
3. *Dedication.—Acceptance.*—Where it appears that such street was used by the public both before and ever since the dedication, and that the town authorities worked the street where such work was needed, an acceptance of the dedication is sufficiently established. *Ib.*
4. *Street.—Obstruction (Post).—Personal Injury.—Contributory Negligence.—Frightened Team.*—Where the plaintiff's team became frightened and unmanageable and shied out of the beaten path of the road, and bringing plaintiff's wagon into collision with a post in the roadway, a few feet from the beaten path, causing plaintiff's injuries, he is not guilty of contributory negligence, even though he knew the post was in the road. *Ib.*
5. *Obstruction.—Use of Street With Knowledge of Obstruction.*—A person is not legally compelled to forego the use of a public highway which is open to public use simply because of an obstruction therein. *Ib.*

HUSBAND AND WIFE.

See CRIMINAL LAW, 2; FRAUDULENT CONVEYANCE, 1, 4, 6; MARRIED WOMAN; PHYSICIAN AND PATIENT, 1; TRUST, 4.

IMPROVEMENTS.

See EVIDENCE, 1; REAL ESTATE, 3.

INCHOATE INTEREST.

See FORMER ADJUDICATION; FRAUDULENT CONVEYANCE, 6.

INCORPORATION.

See EVIDENCE, 4.

INDORSEMENT.

See MARRIED WOMAN.

INJUNCTION.

See COUNTY COMMISSIONERS, 1, 2, 3; JUDGMENT, 4; JURISDICTION; NUISANCE, 1, 4; PARTIES, 2; PLEADING, 6; TAXES, 2, 7.

1. *Insufficiency of Complaint.—Adequate Legal Remedy.*—If a complaint for injunction does not show that the plaintiff would not have an adequate legal remedy for all injury he might suffer, it is insufficient on demurrer. *Perry* v. *Hamilton*, *271*

2. *Injury to Freehold.—Cutting and Removing Corn.—Landlord and Tenant.*—An injunction forbidding a tenant from cutting and removing stocks of corn from a field cultivated by him as tenant, can not be justified on the ground that such cutting and removal would be an injury to the freehold. *Ib.*

INNOCENT PURCHASER.

See MARRIED WOMAN.

INSOLVENCY.

See FRAUDULENT CONVEYANCE, 3, 5.

INSTRUCTION TO FIND FOR PARTY.

See ASSIGNMENT OF ERRORS.

INSTRUCTIONS TO JURY.

See ASSIGNMENT OF ERRORS; SURETY OF THE PEACE, 5.

1. *Filing.—Bill of Exceptions.*—Instructions which are brought into the record by a general bill of exceptions are only required to be filed in and as a part of such bill.
Ohio and Mississippi R. W. Co. v. *Dunn, 18*

2. *Refusal to Give.—Substantially Given in Others.*—There is no prejudicial error in refusing an instruction which is substantially included in instructions given. *Heltonville Mfg. Co.* v. *Fields, 58*

3. *When Properly in the Record.—Bill of Exceptions.*—Where the words, "given and excepted to by the defendant, February 20, 1891," are written after each instruction given by the court of its own motion, which is signed by the judge trying the cause, and all these instructions, as well as all others given and refused, are embraced in a proper bill of exceptions which was regularly filed, as shown by the record entry, the instructions and the exceptions indorsed thereon are properly in the record.
City of Columbus v. *Strassner, 301*

INSURANCE.

See LIFE INSURANCE.

INSURER.

See TOWNSHIP TRUSTEE, 1.

INTERROGATORIES TO JURY.

See VERDICT, 2.

Conflicting Answers.—If answers to interrogatories to the jury are themselves conflicting, they can not be set up as in conflict with the general verdict. *Heltonville Mfg. Co.* v. *Fields, 58*

INTERROGATORIES TO PARTY.

See PRACTICE, 6.

INTERSTATE COMMERCE.

1. *Police Regulation by State.*—Congress may, by appropriate legislation, subject any article of interstate commerce to the police regulations of any State. *City of Indianapolis* v. *Bieler, 30*

2. *Intoxicating Liquors.*—Under the act of Congress approved August 8, 1890, intoxicating liquors transported from one State into another for use, sale, or storage in the latter State, are subject to its police regulations. *Ib.*

INTOXICATING LIQUORS.

See INTERSTATE COMMERCE, 2; MUNICIPAL CORPORATIONS, 7, 8.

ISSUES.

See EJECTMENT.

JUDGE.

See SPECIAL JUDGE.

JUDICIAL NOTICE.

See DESCRIPTION, 1; DIVORCE, 3; DRAINAGE, 3.

Obstruction of Highway.—Double Tracked Railroad on Twenty Foot Alley.—The court judicially knows that the appropriation of an alley only twenty feet wide to the use of a double-tracked railroad will greatly interfere with, prevent, and obstruct the safe and unobstructed passage of vehicles upon such alley.
Haus v. *Jeffersonville, etc., R. R. Co., 307*

JUDICIAL SALE.

See FRAUDULENT CONVEYANCE, 6.

JUDGMENT.

See DECEDENTS' ESTATES; DECREE; PRACTICE, 1, 8; SUPREME COURT PRACTICE, 5; TOWNSHIP TRUSTEE, 6.

1. *Form Not Objected to in Trial Court.—Supreme Court Practice.*—Where no motion to modify a decree was made in the trial court, the form of the decree can not be objected to on appeal.
Tewksbury v. *Howard, 103*

2. *Objection to Form, How Made.—Waiver.—Practice.*—Objection to the form of a judgment should be raised by motion to modify, and when not so raised, it is waived. *Wood* v. *Hughes, 179*

3. *Fraud in Obtaining.—Necessary Showing in Application for Relief.*—A party who seeks relief from a judgment alleged to have been obtained against him by fraud must show in his application that he has a meritorious defense which he was prevented from making, that he was not guilty of laches in failing to prevent or discover the fraud, and that he seeks relief promptly after making the discovery. *Hollinger* v. *Reeme, 363*

4. *Unauthorized Appearance by Attorney.—Remedy.—Injunction.*—Relief by a defendant against a judgment obtained through the unauthorized appearance of an attorney should be sought in the original cause by way of an application therein for a stay of proceedings and a hearing upon the merits, and not by way of a collateral proceeding for an injunction. *Ib.*

5. *Objection to Form of.—Question, How Saved.—Supreme Court Practice.*—An objection to the form of a judgment can not be considered by this court, unless the objection was made at the time the judgment was entered, and a motion was made or other appropriate steps taken to modify and correct it.
Petitt v. *Petitt, 597*

6. *When will be Considered as Rendered.*—Where a court reads and files a finding and orders judgment to follow the finding, judgment will be considered as rendered of that date.
Mayer v. *Haggerty, 628*

7. *Time of Appeal.*—The time within which an appeal must be taken begins to run from the date of the rendition of the judgment and not from the date of its entry by the clerk in the orderbook. *Ib.*

8. *Nunc Pro Tunc Entry of.—Time of Appeal.*—Where a judgment is entered *nunc pro tunc*, the time within which an appeal can be taken dates from the day on which the judgment should have

been entered and not from the date on which the order for the *nunc pro tunc* entry is made. *Ib.*

9. *Partition.—Final Judgment.—New Trial as of Right.*—Where, in a suit for partition, the title to the real estate is put in issue, and a judgment is rendered as to all the matters in issue, with the usual order for partition, the judgment is a final one as to such matters, and a motion for a new trial as of right must be made within one year from its rendition. *Ib.*

10. *Lien of.—Bankruptcy.—Discharge.*—The lien of judgments rendered against a debtor prior to his discharge in bankruptcy does not attach to the third interest in land vested in his wife by the register's conveyance to the assignee in bankruptcy, which interest he inherits after his discharge. *Ib.*

JURISDICTION.

See APPELLATE COURT; CONSTITUTIONAL LAW, 4, 5; GRAVEL ROAD, 5; TAXES, 3.

Mortgage. — Injunction. — Subject-Matter.—Parties.—Nonresidents.—U, holding purchase-money notes secured by mortgage upon land in Tipton county, assigned them to E, in payment for a lot in the same county, relying upon the latter's false representation that the lot was unincumbered. Afterwards U was compelled to pay a lien existing upon the lot at the time of his purchase. E assigned the notes to B as collateral security for a debt, and C held the notes for B. An action by U seeking to recover so much of the notes as covered the amount of the lien paid, to restrain any disposition of them and to restrain P, the owner of the land, from paying the notes until the rights of the parties were adjusted, was commenced in the Tipton Circuit Court, to which E, B, C, and the land owner P were made parties. The latter was a resident of Tipton county, and all the others nonresidents.

Held, that as P was a necessary party, and as U had an interest in the mortgaged land for that part of the purchase price of the land equal to the lien paid by him on the lot, the Tipton Circuit Court had jurisdiction both of the parties and of the subject-matter.

Urmston v. *Evans*, 285

JURY.

See SURETY OF THE PEACE, 4; TRIAL BY JURY.

LANDLORD AND TENANT.

See INJUNCTION, 2.

LARCENY.

See CRIMINAL LAW, 2, 3.

LAW AND FACT.

See PHYSICIAN AND PATIENT, 2.

LEGACY.

See ADMINISTRATOR.

LEVY.

See EXECUTION.

LICENSE.

See MUNICIPAL CORPORATION, 1, 3, 4.

LIEN.

See ATTORNEY'S LIEN; EXECUTION; GRAVEL ROAD, 1, 2, 3; GUARDIAN AND WARD, 3; JUDGMENT, 10; MECHANICS' LIEN; STATUTE CONSTRUED, 1.

LIENS, PRIORITY OF.

See GRAVEL ROAD, 3; MORTGAGE, 3.

LIFE INSURANCE.

1. *Application.—False Entries in by Agent.—Estoppel.*—Where an applicant for life insurance, in good faith, gives truthful answers to the questions asked him, but the agent, whether purposely or otherwise, without the knowledge or connivance of the applicant, inserts false answers, the wrong is that of the assurer, and the latter is estopped from imputing it to the assured.
Michigan Mut. Life Ins. Co. v. *Leon, 636*

2. *Failure of Assured to Read Answers in Application and Policy.—Negligence.*—An applicant for life insurance is justified in assuming that the agent has, in good faith, correctly recorded his answers to the questions asked; and if the answers are given by him truthfully and in good faith, he is not chargeable with negligence if he signs the application thus prepared without reading it, or if he accepts and retains the policy issued thereon, with a copy of the application attached, without searching it to ascertain whether the assurer's agent had acted honestly with his principal.
Ib.

LIQUOR LAW.

See INTOXICATING LIQUORS.

MAINTENANCE.

See CONVEYANCE, 1.

MALICIOUS PROSECUTION.

1. *Suspicion or Belief of Guilt.—Probable Cause.*—Mere suspicion, or even belief, that a person has committed a crime, based upon circumstances in themselves innocent, is not, in an action for malicious prosecution, sufficient to show probable cause.
Flora v. *Russell, 153*

2. *Advice of Prosecuting Attorney.—When it will Protect.*—The procuring of a warrant, upon the advice of the prosecuting attorney, will not protect against an action for malicious prosecution, unless the facts within the knowledge of the prosecuting witness are fully and fairly stated to such attorney. *Ib.*

3. *Railroad Company.—Liability for Acts of Employes.*—A railroad company is liable, in an action for malicious prosecution, for the acts of its employes within the scope of their employment and in the interest of the company. *Ib.*

4. *Scope of Employment.—Acts Without.*—A check clerk at a railroad station, working under the local freight agent, is not, without more shown, acting within the scope of his employment when he procures a search warrant to discover property stolen from the railroad company. *Ib.*

MANDAMUS.

See COMMON SCHOOLS, 2; STREETS AND ALLEYS, 1.

MARRIED WOMAN.

See HUSBAND AND WIFE.

Promissory Note.—Indorsement.—Suretyship.—Estoppel.—Innocent Purchaser.—Where a wife, being the owner of a promissory note, indorses the same in blank, without restriction, and delivers the possession thereof to a creditor of her husband as collateral security for the latter's debt, and such creditor sells and assigns the note to an innocent purchaser for value, the latter acquires title, the wife being estopped to assert that her assignment was different from what it appears to be. *Shirk* v. *North*, *210*

MASTER AND SERVANT.

See MALICIOUS PROSECUTION, 3, 4; PLEADING, 9.

1. *Railroad.—Incompetent Employe.—Negligence.—Injury to Fellow-Servant.*—The fact that a fireman, who has occasionally served as engineer in a switch yard, is placed in charge of an engine to do switching, is not sufficient in itself to charge the railroad company with negligence, in an action by a fellow-servant to recover for an injury alleged to have been sustained by reason of the incompetence of such person.
Ohio and Mississippi R. W. Co. v. *Dunn*, *18*

2. *Employment of Servant.—Knowledge as to Fitness.*—In an action by a servant to recover for an injury alleged to have been caused by the negligence of a fellow-servant, the fact that the latter had been employed only a few hours prior to the injury and that he had been secured from the same branch of service of another company without inquiry as to his fitness, is not in itself sufficient to charge the defendant company with negligence. *Ib.*

3. *When Case May be Withdrawn From Jury.*—It is the duty of the trial court to take the case from the jury, upon proper request, when any element essential to the finding of the fact in issue has not been proved, or when there is no evidence from which, when undisputed, the jury would be justified in concluding that such fact exists. *Ib.*

4. *Defective Machinery.—Personal Injury.—Knowledge of Defects.—Complaint.*—In action by a servant against the master for injuries sustained by reason of defective machinery, an allegation that the master knew of the defects, and that the servant had no knowledge thereof and could not observe the same, for stated reasons, it is sufficiently shown that the master and servant were not on an equality as to the observation of the defect.
Heltonville Mfg. Co. v. *Fields*, *58*

5. *Negligence.—Defective Ladder.—Injury to Servant.—Liability of Master.*—Where an employe, whose duties require him to use a ladder, discovers that the ladder is defective and dangerous, and notifies the master, who promises to furnish another, but before doing so the employe, in using the defective ladder, is injured, the master is not liable, although the service in which the ladder was used was of a kind which could not be postponed.
Meador v. *Lake Shore, etc., R. W. Co.*, *290*

6. *Personal Injury (Death) of Servant.—Damages.—Defective Appliance.—Knowledge of.—Verdict, When Not Sustained by the Evidence.*—In an action for damages by the administratrix of a deceased servant whose death was caused by a defective appliance (a derrick), there can be no recovery where the evidence shows, beyond controversy, that the servant had an equal, if not a better, opportunity of knowing of the defect than the master.
Big Creek Stone Co. v. *Wolf, Admx.*, *496*

7. *Assumption of Ordinary Risks of Service.—Age and Understanding of Servant.—Presumption.*—An employe of mature age and suffi-

cient understanding will be presumed to have assumed all the ordinary risks attending the service, and where such age and understanding are wanting, such fact should be disclosed by the complaint, otherwise he will be presumed to have attained to such understanding and to be of such age.
Myers v. *W. C. DePauw Co.*, *590*

8. *Ordinary Risks.—Glass Manufactory.*—It is necessarily one of the natural incidents of the handling of glass, in the processes of its manufacture, that it will be broken without violence from, or the fault of, those who handle it. *Ib.*

9. *Dangerous Service.—Assumed Risks.—Care by Servant.*—The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. The servant is required to exercise his faculties to a degree in proportion to such dangers. *Ib.*

10. *Assumed Risk.—Glass Manufactory.—Failure to Use Gauntlets.*—If an employe in a glass manufactory knew of the custom of employes to wear leather gauntlets, and with such knowledge he went about his service without them, and without any promise by the master to supply them, the risk became one of the assumed risks of the service, and liability therefor was waived, and the same would be true even if it were the duty of the master to furnish the gauntlets instead of having been a mere custom. *Ib.*

MECHANIC'S LIEN.

1. *Purchaser of Real Estate.—Liability of.—Complaint.*—A complaint to enforce a mechanic's lien under the act of 1883 is sufficient as to a purchaser of the real estate if it shows that the furnishing of materials commenced prior to the transfer.
Jeffersonville Water Supply Co. v. *Riter*, *170*

2. But a complaint against A to enforce a mechanic's lien, which shows that the contract was made with B prior to a conveyance of the land to A, is bad if it fails to show that materials were furnished or labor done while the title was still in B. *Ib.*

3. *Failure of Purchaser to Record Deed.—Notice.*—The right to assert a mechanic's lien is not affected by the failure of a purchaser of the real estate to have his deed recorded, whereby notice of the transfer is not acquired until after the work is begun. *Ib.*

4. *Sufficiency of Notice.—Time of Completion of Work.—Pleading.*—A general allegation that notice of intention to hold a lien was filed "within sixty days after furnishing the material and doing the work" is sufficient under the statute and is not controlled by special averments showing that the work was submitted to inspection and test at an earlier day, if it also is shown that defects were thereby disclosed which postponed its actual completion to the date alleged. *Ib.*

MINOR.

See CONTRACT, 2.

MISCONDUCT OF COUNSEL.

See SURETY OF THE PEACE, 7.

MISJOINDER OF CAUSES.

See DECEDENTS' ESTATES.

MISTAKE.

See SCHOOL TOWNSHIP, 1.

MORTGAGE.

See FORECLOSURE OF MORTGAGE; JURISDICTION.

1. *Of Building.—When Ground Included.*—A mortgage written and executed in the form of a real estate mortgage, but describing the property as "one one-story frame building store-room, situate on lot number forty-two, in block number thirty-four in the original plat of the town of Kirklin," includes not only the building but also that part of the lot upon which the building stands, and as much more as is necessary to the use of the building as a place for the sale of merchandise. *Wilds* v. *Ward, 373*

2. *Strict Foreclosure.—Can not be had Against Owner of the Fee.—Purchaser at Sheriff's Sale.—Parties.*—In 1876, B. recovered a judgment against C. who was at the time the owner of certain real estate, which judgment became a lien on the land. The land was sold by the sheriff, on execution issued on this judgment, on February 17, 1877, to J. and J. received a sheriff's deed for the same, March 16, 1878. W. being the owner, by assignment, of a mortgage on such land, executed June 17, 1875, by C. and wife, brought suit January 8, 1878, against C. and wife, to foreclose the same, to which action J. was not made a party, and obtained a decree foreclosing the same March 11, 1878, and the land was sold to W. May 11, 1878, for which he received a sheriff's deed June 20, 1879. W. brings suit against J. for the purpose of obtaining a decree in *strict* foreclosure.

Held, that J. by his purchase at sheriff's sale, became the owner of the fee, of the land in dispute, and was such owner at the time the action for strict foreclosure was brought.

Held, also, that a strict foreclosure can not be had against one who owns the fee to the land; but is only applicable against one who has an equity of redemption which has not been cut off or barred.

Held, also, that as J. was not a party to the suit of W. to foreclose his mortgage, the decree in that case can in no wise affect J.'s rights. *Jackson* v. *Weaver, 539*

3. *Mortgagee Takes Subject to the Rights of the Public.—Priority of Liens.—Eminent Domain.*—As the purchaser of real estate takes the property subject to the implied paramount right of the public, so the mortgagee takes his mortgage with notice of such paramount right, and must submit to its subsequent exercise. *Murphy* v. *Beard, 560*

MORTGAGE DEED.

See GUARDIAN AND WARD, 3.

MORTGAGEE.

See GRAVEL ROAD, 4.

MOTION.

See DECEDENTS' ESTATES; PLEADING, 1, 2; SPECIAL FINDING, 2.

MUNICIPAL CORPORATION.

See CITY; TOWN, INCORPORATED.

1. *License of Breweries, etc.—Discrimination.—Constitutional Law.*—An ordinance of the city of Indianapolis licensing breweries, distilleries and their depots and agencies established in the city, with other wholesale dealers in malt liquors, but excepting from its operation residents of the city doing a wholesale business in bottled beer, is, as to the exception sought to be made, void for discrimination. *City of Indianapolis* v. *Bieler, 30*

2. *Ordinance Void in Part and Valid in Part.*—Where the part of an

ordinance which is void for discrimination can be struck out, leaving the remainder complete in itself, sensible and capable of being executed against all alike, the latter will stand. *Ib.*

3. *License Ordinance.—Language Construed.*—An ordinance requiring a license fee of "every person or persons, firm, corporation or company carrying on a distilling or brewing business * * and of all breweries and distilleries," applies to every establishment, and exacts a separate fee for each one. *Ib.*

4. *License Fee.—Amount Discretionary With City Authorities.*—Where a city is granted power, by the Legislature, "to tax, license and regulate distilleries and breweries," etc., an ordinance imposing a license fee is an exercise of police power in restraint of a harmful occupation, and the fee to be required is subject to the discretion of the city authorities. *Ib.*

5. *Powers of.*—Municipal corporations have such powers only as are conferred upon them by the act of the Legislature creating them, and such incidental powers as are implied by their creation, and as are essential for the accomplishment of the purposes of their creation, and for their continued existence.
Champer v. *City of Greencastle*, *339*

6. *City Ordinance, when Subject to the Objection of Unreasonableness.*—A city ordinance passed under such implied power, or under a general grant of power, is not valid unless it is reasonable and within the power conferred, either by express statute or by necessary implication. *Ib.*

7. *City Ordinance.—To Regulate Places Where Intoxicating Liquors are Sold.—When Reasonableness of Ordinance may be Inquired Into.*—The power conferred upon municipal corporations (R. S. 1881, section 3154) "to regulate all places where intoxicating liquors are sold to be used on the premises" (R. S. 1881, sections 3106, subd. 13), is a general grant of power, and a city ordinance passed under such general authority is open to the inquiry whether its passage is a reasonable exercise of the power conferred by statute.
Ib.

8. *City Ordinance Regulating Places Where Intoxicating Liquors are Sold.—When Unreasonable and Invalid.*—A city ordinance forbidding the erection or maintenance of door screens, window blinds, or stained, ground, colored or darkened glass to the doors, windows or openings of any saloon, shop or other place where intoxicating liquors are sold to be used on the premises; or the erection, maintenance of any obstruction of any kind whatever, of such doors, windows or openings, that will obscure or prevent a full view of the interior of such saloon, etc., and providing that the ordinance shall not be so construed as to prevent saloon keepers and others mentioned from having the usual and ordinary shutters to their doors, is unreasonable and invalid. *Ib.*

9. *City.—Street Improvement.—Street Railway.—When Cost of Paving Between the Rails is Chargeable to the Railway Company.*—Where, by contract between a street railway company and a city, it is left to the judgment of the council whether they would assess the cost of pavement between the rails, against the railway company or against the abutting property, the assessment for the cost between the rails of the street railway can not attach to the abutting property when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay.
State, ex rel., v. *Common Council, etc.*, *455*

10. *Street Improvement.—How Made.—Cost of.*—The street improvement could only be made on the order of the common council, and the assessment for its cost could be directed only against the specific property designated in the ordinance. *Ib.*

11. *Street Improvement.—Authority of Mayor to Contract for.—When Ordinance a Part of Contract.*—If a mayor enter into a contract with a bidder for street improvement, by authority of the common council, his contract with the contractor for the improvement is binding only in so far as it is within the power conferred by the common council, and the ordinance directing the improvement, when properly referred to, constitutes a part of, and is the base of, the contract. That the ordinance is a part of the contract, see opinion. *Ib.*

12. *Street Improvement.—Duty of Contractor to Take Notice of Ordinance.—Contract.*—It is the duty of a contractor to inform himself as to an ordinance on which his contract is based and which is to form the basis of his claim. *Ib.*

13. *Town.—Unplatted Land in Corporation Limits.—Validity of Incorporation.*—The fact that unplatted or farming land is included in the limits of an incorporated town does not render the incorporation invalid. *Indiana Improvement Co.* v. *Wagner, 658*

MURDER.

See VERDICT, 1.

NEGLIGENCE.

See ASSIGNMENT OF ERRORS; CONTRIBUTORY NEGLIGENCE; LIFE INSURANCE, 2; MASTER AND SERVANT, 1, 5; RAILROAD.

1. *Of Parents.—Personal Injury of Child.—Sui Juris.—Complaint, Necessary Allegations.*—It is not negligence in parents to let a boy eleven years of age attend school, where to do so the boy must cross a railroad in going to and from school; and a complaint in an action by such boy for personal injuries sustained while crossing the railroad, need not allege that his parents were free from negligence, but it is sufficient to show his own freedom from contributory negligence, the boy being *sui juris*.
Cleveland, etc., R. W. Co. v. *Keely, 600*

2. *Of Railroad Company.—At Street Crossing.—Violation of City Ordinance.—Suddenly Starting Train, Standing across Street, without Warning.—Custom.*—It is negligence in a railroad company to obstruct a street crossing with its train to the interruption of public travel for fifteen minutes, in violation of a city ordinance; and it was also negligence, after allowing the train to stand still across the street and sidewalk, the engineer having left his usual post on the engine, to then start back suddenly without warning, where persons were waiting on either side of the crossing, and had waited so long, particularly children going to and returning from school, who had for a long time been allowed to cross through standing trains at that point. *Ib.*

3. *County.—Defective Bridge.*—The rule that counties are liable for injuries caused by defects in bridges which they are bound to keep safe, but negligently fail to do so, is the law of this State, although there is no statute creating such liability.
Board, etc., v. *Wagner, Admr., 609*

4. *Railroad.—Obstruction on Depot Platform.*—It is negligence on the part of a railroad company to place an obstruction consisting of a plank two inches thick upon a depot platform used by passengers and trainmen. *Brown* v. *Ohio, etc., R. W. Co., 648*

5. *Brakeman.—Duty to Alight from Moving Train.—Personal Injury.*—Where a brakeman upon a freight train is required, in the discharge of his duty, to alight from the moving train while passing a station to receive orders, and does so without any negligence, but by reason of an obstructing plank nailed upon the station platform by the employer is caused to stumble and fall under the train to his injury, the employer is liable in damages. *Ib.*

6. *Contributory Negligence.—Alighting Upon Icy Platform.*—In such case the getting off the moving train, being in the line of duty, is not negligence, even though the platform upon which the brakeman alighted was covered with sleet. *Ib.*

NEW TRIAL.

See JUDGMENT, 9; SPECIAL FINDING, 3; SPECIAL JUDGE, 2; SUPREME COURT PRACTICE, 6.

1. *Error in Calculation of Amount Due.*—Where it appears from the findings that erroneous calculations of the sums found owing from the parties, each to the other, were made, such error is sufficient ground for a new trial. *Pennington* v. *Pennington*, *8*

2. *Admission or Rejection of Evidence.—Practice.*—Where a reason for a new trial is the exclusion or admission of evidence, the motion must point out with reasonable certainty the evidences excluded or admitted. *Heltonville Mfg. Co.* v. *Fields*, *58*

3. *Newly Discovered Evidence.—Affidavits not in Record.—Supreme Court Practice.*—Where the affidavits in support of a motion for a new trial, on the ground of newly discovered evidence, are not in the record, no question thereon is presented. *Ib.*

4. *As of Right.—When not Demandable.*—A new trial as of right is not obtainable where the cause proceeded to judgment on the entire complaint against the defendant, as to one of the paragraphs of which a new trial as of right was not demandable; notwithstanding such an issue was raised by the cross-complaint, to which the judgment makes no reference. *Taylor* v. *Calvert*, *67*

5. *When Motion for is not a Prerequisite to Review of Errors.—Practice.*—It is only where there has been a trial that a motion for a new trial is required as a condition precedent to a review of errors in this court affecting the trial. *Werley* v. *Huntington Waterworks Co.*, *148*

6. *As to Part of Issues.—Rule as to.*—In order that a new trial may be granted as to part of the issues, it must clearly appear that the issues to be decided are wholly between the parties as to whom a new trial is asked, and that the rights of the other parties to the original action will not be affected. *Bennett* v. *Closson*, *542*

7. *As of Right.—Rule as to.*—It is only in actions for the recovery of real estate and to quiet title to real estate that the losing party may have a new trial as of right under the statute, section 1064, R. S. 1881; and if two or more substantive causes of action proceed to judgment in the same case, whether properly or improperly joined, one being of the class in which a new trial as of right may be granted and the other not, the latter will control the procedure, and a new trial as of right will be denied. *Ib.*

8. *Exception to Ruling on.—When Sufficiently Made to Appear in Record.—Supreme Court Practice.*—Where an exception to the overruling of a motion for a new trial appears in that part of the transcript where the orderbook entry of the motion and the ruling thereon are found, but no such exception appears in the

bill of exceptions, where the motion and order overruling it are also found, an exception is sufficiently made to appear to entitle the appellant to have the questions involved in the motion for a new trial considered and decided.
Indiana Improvement Co. v. *Wagner*, *658*

9. *Evidence.—Affidavit.—Clerical Error.*—A ground for a new trial, that the court erred in receiving in evidence, over appellant's objection, the affidavit of G. is unavailing where no such affidavit was put in evidence; and the fact that on the page to which the brief refers, the affidavit of M. is found, and G. appears as the notary public before whom the affidavit was made, does not justify the court in treating it as a clerical error. *Ib.*

NONRESIDENTS.

See JURISDICTION.

NOTICE.

See GRAVEL ROAD, 4; JUDICIAL NOTICE; MECHANIC'S LIEN, 3, 4; MUNICIPAL CORPORATION, 12; TAXES, 4, 9, 12.

NUISANCE.

1. *Injunction.—Removal of Wooden Building Within City Fire Limits.*—A property owner may maintain a suit to enjoin the removal of a wooden building to a place within the fire limits, in violation of a city ordinance forbidding it, where it is to be located dangerously near the plaintiff's frame house. *Kaufman* v. *Stein*, *49*
2. *City.—Protection Against Fire.—Inherent Power.*—A city in this State, without reference to any legislative grant, has inherent power to prescribe fire limits, and to prohibit the removal of wooden buildings into such limits. *Ib.*
3. *Removal of Buildings.—What Amounts to.*—When fire limits are established, it is presumed that it is with reference to the existing location of buildings within such limits, and the subsequent removal of a wooden building to a point twenty feet distant upon the same lot is within the inhibition. *Ib.*
4. *Privy.—Injunction.*—The erection of a privy and vault within three and one-half feet of the dining room of an adjoining owner may be enjoined as a nuisance, without reference to the manner in which the vault is constructed or to the intention of the defendant to use disinfectants. *Radican* v. *Buckley*, *582*

OBSTRUCTION OF HIGHWAY.

See HIGHWAY, 4, 5; JUDICIAL NOTICE; PLEADING, 7.

ORDINANCE.

See MUNICIPAL CORPORATION, 2, 3, 6, 7, 8, 11, 12; NEGLIGENCE, 2.

PARTIES.

See COMMON SCHOOLS, 2; DECEDENTS' ESTATES; DEMURRER; DRAINAGE, 5; JURISDICTION; MORTGAGE, 2; SPECIFIC PERFORMANCE.

1. *Plaintiff.—Community of Interest.—Banks.—Taxes.*—Where two banks were assessed separately, and the tax assessed against the one does not affect the property of the other, and the relief to which the one is entitled, if granted, would not affect the other, they could not, in the absence of some community of interest, unite in a suit to enjoin the collection of such taxes.
Jones, Treas., v. *Rushville Nat'l Bank*, *87*
2. *Taxes.—Action to Enjoin.—County Commissioners.*—In an action

to enjoin the collection of taxes, the county commissioners are proper parties along with the county treasurer.
Cummings, Treas., v. *Stark*, *94*

3. *Defendant.—Specific Performance.—Contract.—Conveyance.*—Where A entered into a contract with B to convey to him certain lands, and upon request of B, A made the deeds to both B and his wife, and tendered the same to B, which were refused, the wife was not a necessary party defendant in a suit for specific performance.
Tewksbury v. *Howard*, *103*

4. *School Township.— School Town.— School Property.*— A school town is a proper party in an action affecting property which it acquired by accession, from the school township, by reason of its incorporation.
Newpoint Lodge, Free and Accepted Masons v. *School Town of Newpoint*, *151*.

5. *Plaintiff.—State, ex rel. Attorney-General.—School Revenue.—Unexpended Balance.—Township Trustee.—Action.*—An action to recover the unexpended balance of tuition revenue, in excess of $100, in the hands of a township school trustee, which he has neglected or refused to pay over to the county treasurer, is properly brought in the name of the State on the relation of the Attorney-General. *State, ex rel.*, v. *McClelland, Tr.*, *395*

PARTITION.

See FRAUDULENT CONVEYANCE, 6; JUDGMENT, 9; PRACTICE, 7.

PARTNERSHIP.

See DECEDENTS' ESTATES.

PARTY IN INTEREST.

Right to Sue.—Contract.—Delivery.—A person for whose benefit a contract has been made may bring suit on the same, and it is not necessary that the contract should ever have been delivered to him. *Copeland, Exr.*, v. *Summers*, *219*

PAYMENT.

See TAXES, 7.

PERSONAL INJURY.

See BRIDGE, 2; DAMAGES; HIGHWAY, 2, 4; MASTER AND SERVANT, 4, 5, 6, 8, 9, 10; NEGLIGENCE, 1; PLEADING, 8, 9; RAILROAD; SURETY OF THE PEACE, 1.

PERSONAL PROPERTY.

See TRUST, 4.

PHYSICIAN AND PATIENT.

1. *Physician's Bill for Treatment of Wife.—Liability for.—Assumption and Payment by Wife.*—While a physician's bill for treating the wife is generally the debt of the husband, yet the wife may treat it as her own debt, and pay it.
City of Columbus v. *Strassner*, *301*

2. *Skillfulness of Physician a Question of Fact.—Presumption.—Instruction to Jury.*—The law raises no presumptions as to the skillfulness of a physician in regular practice, nor that the patient will obey the directions of the physician. Such presumptions are inferences of fact to be drawn by the jury from the evidence or from a given state of facts, and it is error for the court to instruct the jury as to what inferences they shall draw. *Ib.*

PLAT.

See HIGHWAY, 2.

PLEADING.

See ANSWER; COMPLAINT; CROSS-COMPLAINT; DECEDENTS' ESTATES; MECHANIC'S LIEN, 4; PRACTICE, 5; SUPREME COURT PRACTICE, 3.

1. *Complaint.—Motion to Make More Specific.*—It is not error to overrule a motion to make a complaint more specific where the specific allegations could not have weakened the complaint, and were not essential to advise the defendant of the cause of action he is called upon to defend. *Heltonville Mfg. Co.* v. *Fields*, *58*

2. *Motion to Strike Out.*—Where a complaint contains pertinent facts sufficient to support the judgment, no available error can be predicated upon the overruling of a motion to strike out other and immaterial facts. *Harter, Admx.*, v. *Songer*, *161*

3. *Cross-Complaint. — Attorney's Lien.* — Where a cross-complaint seeking to have an attorney's lien declared on certain land does not allege that the notice of lien was entered within a reasonable time after the rendition of the decree, nor that the services were of any value, it is insufficient.

Quaere, can an attorney's lien be enforced in a suit to enjoin the enforcement of a supposed legal lien by execution?

Wood v. *Hughes*, *179*

4. *Theory of.*—A pleading must proceed upon a definite theory, and if bad upon that theory it can not be sustained upon some other. *Copeland, Exr.*, v. *Summers*, *219*

5. *Complaint.—Taxes.—Omitted Property.—City Clerk.*—The sufficiency of the complaint in this case, being an action to cancel and declare void certain taxes as levied upon omitted personal property by the city clerk, is decided on the authority of *Reynolds, Audr.*, v. *Bowen, Admr.*, 138 Ind. 434.

City of Delphi v. *Bowen, Admr.*, *235*

6. *Answer, Sufficiency of.—Theory.—Injunction.*—An answer to a complaint in a suit for injunction is sufficient where the conduct complained of is confessed, and the answer is justified by a theory sufficient, though different from that upon which complaint is made. *Hawkins* v. *Stanford, Tr.*, *267*

7. *Complaint, Sufficiency of Facts.—Theory.—Railroad.—Damages.—Obstruction of Alley.*—Where the theory of a complaint against a railroad company for damages was that the company had negligently and unnecessarily increased the obstruction of an alley by laying its two tracks thereon six feet apart instead of twelve as required by ordinance, and had further and unnecessarily, and negligently obstructed the alley by running cars over such tracks at a greater rate of speed than that provided by the city ordinance, but no facts are stated by which such rate of speed either aggravated or increased the obstruction of the alley, nor that the prohibited rate of speed injured the appellant, and no facts are alleged showing that the difference in space between the tracks did not increase the necessary obstruction of the alley, the complaint did not state facts sufficient to constitute a cause of action. *Haus* v. *Jeffersonville, etc., R. R. Co.*, *307*

8. *Complaint, Sufficiency of.—Recitals.—Personal Injury.—Passenger Pushed from Platform of Car by Railroad Employe, and Run Over by Train.—When Negligence of Company is Shown.*—The complaint in an action for personal injury against a railroad company, alleged, substantially, that plaintiff took passage upon defendant's pas-

senger train at the town of S., with a proper ticket, for the town of M.; that upon the arrival of said train at the town of S. plaintiff undertook to, and did, get on the platform of one of the cars of said train to enter the same, but that without fault or negligence on plaintiff's part, but on account of the carelessness and negligence of defendant's agent, plaintiff was, by such employe, pushed from the platform of said car just as the train was starting, and plaintiff, without fault or negligence on his part, fell between the cars of said train onto the railroad track, and was carelessly and negligently caught and run over by defendant's said train, and was mashed, bruised, and mangled; "that all of said injuries were caused by, and the direct result of, said carelessness and negligence of defendant in pushing plaintiff off its train, as aforesaid, and carelessly and negligently running over him * * as aforesaid, and wholly without fault or negligence of plaintiff."

Held, that the complaint is sufficient.

Held, also, that the facts contained in the last clause, in quotations, are not mere recitals, but are direct allegations of material facts.
Louisville, etc., R. W. Co. v. *Kendall*, *313*

9. *Complaint.—Master and Servant.—Defective Appliance.—Personal Injury.—Death.*—A complaint for damages caused by a defective appliance (a derrick) by the administratrix of the deceased servant against the master, is sufficient where it shows that the master had full knowledge of the defect, and that the deceased servant was ignorant of the same.
Big Creek Stone Co. v. *Wolf, Admx.*, *496*

10. *Answer.—Verification.—Action to Establish Lost Will.*—In an action by devisees to establish a lost will, an answer of general denial to be available, need not be verified.
Wright, Admx., v. *Fultz*, *594*

POLICE REGULATION.

See INTERSTATE COMMERCE, 1.

PRACTICE.

See ASSIGNMENT OF ERRORS; BILL OF EXCEPTIONS, 3; CONSTITUTIONAL LAW, 1; CONTRACT, 5; JUDGMENT, 2; MASTER AND SERVANT, 3; NEW TRIAL, 2, 5; SPECIAL FINDING, 1, 3; SUPREME COURT PRACTICE; WAIVER.

1. *Judgment Based on One Paragraph of Complaint.—Rulings on Other Paragraphs Not Available Error.*—Error can not be predicated upon a paragraph of complaint, where the special findings show that the judgment is based upon another paragraph of the complaint. *Tewksbury* v. *Howard*, *103*

2. *Motion to Docket Cross-Complaint as Separate Action.—Bill of Exceptions.*—A motion by a plaintiff to docket a cross-complaint as a separate action is a collateral one, and must be brought into the record by a bill of exceptions. *Thiebaud, Tr.*, v. *Tait, Treas.*, *238*

3. *Not Available Error to Refuse to Docket Cross-Complaint as Separate Action.*—It is not available error to overrule a motion to docket a cross-complaint as an independent action. *Ib.*

4. *Intermediate Errors.—When Not Available for Reversal of Judgment.*—Intermediate errors are not available for reversal if the final judgment is right. *Ib.*

5. *Overruling Motion to Strike out Parts of Pleading.—When not Reversible Error.*—The overruling of a motion to strike out parts of a complaint is not such error as will work a reversal where it

is manifest that the moving party has not been prejudiced by the ruling. *Boruff* v. *Hudson*, *280*

6. *Refusing to Strike out Interrogatory.—No Answer Disclosed by Record.*—The defendant can not complain of the overruling of a motion to strike out an interrogatory propounded to him by the plaintiff, where the record does not disclose any answer to the interrogatory. *Ib.*

7. *Action for Relief from Decree in Partition.—Demurrer, Effect of.—Right to Controvert the Facts Alleged.*—If a demurrer to a complaint seeking relief from a decree in partition be overruled, the effect of the demurrer in such case is that it admits the truth of the complaint only for the purpose of testing its sufficiency; and the defendant may thereafter controvert the truth of the facts alleged in the complaint. *Suin* v. *Deschamp*, *502*

8. *Motion to Modify Judgment.—Bill of Exceptions.*—In order that any question may be presented on appeal upon a motion to modify a judgment, the motion must be brought into the record by bill of exceptions. *Scanlin* v. *Stewart*, *574*

9. *Erroneous Refusal to Grant Change of Venue.—How Question Saved.*—The erroneous refusal of a change of venue must be made the ground of a motion for a new trial or it will not be considered on appeal. *Ib.*

PRESUMPTION.

See Execution; Fraudulent Conveyance, 3; Gravel Road, 4; Master and Servant, 7; Physician and Patient, 2; School Township, 3; Special Judge.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PROBABLE CAUSE.

See Malicious Prosecution, 1.

PROMISSORY NOTE.

See Conveyance, 2; Married Woman.

PROSECUTING ATTORNEY.

See Malicious Prosecution, 2.

PROSTITUTION, HOUSE OF.

See Criminal Law, 1.

PROXIMATE CAUSE.

See Railroad.

PURCHASE-MONEY.

See Fraudulent Conveyance, 4.

QUIETING TITLE.

See Conveyance, 2; Title, 1.

RAILROAD.

See Contributory Negligence; Judicial Notice; Malicious Prosecution, 3; Master and Servant, 1; Negligence, 2, 4, 5, 6; Pleading, 7, 8; Street Railway.

Negligence.—Personal Injury.—Proximate Cause.—Remote Cause.—Concurring Causes.—Fellow-Servant Rule—Defective Headlight.—Col-

lision.—A, as engineer, was in charge of engine No. 172, which he was required to operate with a defective headlight. A had special orders to stop at S, and remain until No. 167 passed. A stopped at S, but in violation of such order pursued his journey with the defective engine, before No. 167 had passed. After leaving S two and three-quarter miles, and having observed the approach of No. 167, A stopped his engine when one and a quarter mile distant from No. 167, there being upon the front of No. 172 two green lights burning brightly, and on board were handlamps to be lighted and placed in the headlight when it failed, for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion they were not so placed, and no headlight was burning. From S eastward the track was straight and free from obstruction, with a decline in the grade for four miles. No. 167 came from the east at the rate of thirty miles an hour, and her engineer and fireman having looked but failed to observe No. 172, collided with the same, in which collision B, the fireman on No. 172, was injured, for which injury he sues the railroad company for damages.

Held, that the proximate cause of B's injury was the negligence of A, a fellow-servant of B, in not obeying the order given him to remain on the side-track at S until No. 167 passed, and in failing to place the lighted handlamps in the headlight.

Held, also, that the negligence of the railroad company in failing to furnish a proper headlight was a remote cause of the injury.

Held, also, that the negligent omission of the company to furnish a proper headlight, and the negligent acts of A were not concurrent in causing the injury.

New York, etc., R. R. Co. v. *Perriguey, 414*

RAPE.

See CRIMINAL LAW, 1.

REAL ESTATE.

See DESCRIPTION, 1, 2; ESTOPPEL; FRAUDULENT CONVEYANCE, 6; MECHANIC'S LIEN, 1; TRUST, 1; WILL, 1.

1. *Description.—Quantity.—Metes and Bounds.*—It is only in the absence of monuments, courses and distances that the quantity of land named in a deed will govern.
Silver Creek, etc., v. *Union Lime, etc., Co., 297*

2. *Description.—Metes and Bounds.—Adverse Possession.—Ejectment.*—Where the evidence does not expressly show any adverse possession of lands beycnd the metes and bounds fixed in the deed, the metes and bounds must control in a possessory action. *Ib.*

3. *Improvements During Litigation.* — *Bona fide* improvements, for which a claim can be made, can not be put upon land pending litigation concerning it. *Mayer* v. *Haggerty, 628*

REASONABLE DOUBT.

See SURETY OF THE PEACE, 4.

RECORD.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY, 3; MECHANIC'S LIEN, 3.

RECOVERY.

See EJECTMENT; FRAUDULENT CONVEYANCE, 2.

REDEMPTION.

See GUARDIAN AND WARD, 3, 4, 5.

REFORMATION OF INSTRUMENT.

See SCHOOL TOWNSHIP, 1, 2.

Deed.—Decision, When not Contrary to Law.—The findings and conclusion of the court effecting a reformation of a written instrument (a deed), are not contrary to law, where it appears, not only by the preponderance of the evidence, but to a moral certainty, that words (a reversionary clause), by mutual mistake, were omitted therefrom, materially altering the effect of the instrument. For the evidence, see opinion. *Board, etc.*, v. *Owens*, *183*

REIMBURSEMENT.

See GUARDIAN AND WARD, 2; TOWNSHIP TRUSTEE, 4.

REMONSTRANCE.

See GRAVEL ROAD, 5.

REMOTE CAUSE.

See RAILROAD.

RENT.

See EVIDENCE, 1.

REPORTER'S LONGHAND MANUSCRIPT.

See BILL OF EXCEPTIONS, 2.

RES ADJUDICATA.

See GUARDIAN AND WARD, 5; FORMER ADJUDICATION.

RESIDENCE.

See DIVORCE, 1, 3.

RETURN.

See FUGITIVE.

REVERSION.

See CONVEYANCE, 2; DEED, 1.

SALE.

See JUDICIAL SALE; SHERIFF'S SALE.

SCHOOL.

See COMMON SCHOOLS.

SCHOOL FUND.

See TOWNSHIP TRUSTEE, 5.

SCHOOLHOUSE.

See DEED, 3.

SCHOOL PROPERTY.

See DEED, 2, 3; PARTIES, 4.

SCHOOL REVENUE.

See COMMON SCHOOLS, 4; CONSTITUTIONAL LAW, 2; PARTIES, 5.

SCHOOLTEACHER.

See SCHOOL TOWNSHIP, 1, 5, 6, 7, 8.

SCHOOL TOWN.

See PARTIES, 4.

SCHOOL TOWNSHIP.

See DEED, 1; PARTIES, 4.

1. *Teacher.—Contract.—Mistake.—Reformation.*—A contract for the services of a teacher in the public schools of a township, which, as written and signed, appears upon its face to be between the teacher and the civil township, may, in an action thereon against the school township be reformed upon allegations of mutual mistake, and enforced against the latter corporation.
Sparta School Tp., etc., v. *Mendell*, *188*

2. *Reformation of Contract.—Demand.*—Where the only relief sought is the reformation of a contract, a previous demand for a correction is essential; but where, in addition to the reformation, a recovery is asked, no prior demand is necessary. *Ib.*

3. *Township Trustee.—Contracts of Predecessor.—Presumption as to Knowledge.*—An incoming township trustee is presumed to have come into possession of knowledge of all the affairs of his school township, and he can not ignore contracts made by his township through his predecessor, upon the ground that it is defective in form. *Ib.*

4. *Character of Contract.—Inquiry.*—A contract between a township, by its trustee, and a teacher, for the latter's services, although on its face the contract is by the civil township, is sufficient to put a successor of the trustee upon inquiry as to the real character in which the outgoing trustee intended to, and did, contract. *Ib.*

5. *Trustee May Employ Teacher for Service Extending into Term of Successor.*—A township trustee may employ a teacher for a school term which will be in the official term of his successor in the trust. *Ib.*

6. *Teacher's Contracts.—Limited by Available Public Funds.*—The nature of the service, and the public interests involved, require that contracts to teach public schools shall be construed to be so limited as to correspond with the public funds available. *Ib.*

7. *Offer of Different School.—Teacher Not Bound to Accept.*—A teacher who has contracted with a township for a certain school is not bound to accept in lieu thereof an inferior school, which by reason of a lack of attendance is likely to be discontinued by the trustee at any time. *Ib.*

8. In an action by a teacher upon a contract to teach a particular school, an answer that a different school was offered is avoided by a reply showing that another competent teacher had been previously contracted with for the offered school. *Ib.*

9. *Construction of Contracts of Public Officers.*—The powers of a public officer to contract being prescribed by law, his contracts are presumed to have been executed in the capacity corresponding with the official duty the officer ought to perform respecting the subject-matter in hand. *Ib.*

SHERIFF'S SALE.

See MORTGAGE, 2.

SIDEWALK.

See STREETS AND ALLEYS, 2.

SPECIAL FINDING.

See DRAINAGE, 2; EXECUTION; SUPREME COURT PRACTICE, 3; TAXES, 6.

1. *Omission of Material Fact.—Remedy.—Practice.*—Where a special finding omits material facts, the remedy is by a motion for a new trial and not by a motion to modify. *Bunch et al.* v. *Hart et al.*, *1*

2. *Sufficiency of Evidence.—Supreme Court Practice.*—If the finding of the court is supported by some evidence, the appellate tribunal will not disturb it. *Pennington* v. *Pennington*, *8*

3. *Motion to Strike Out or to Make More Specific.—Practice.—New Trial.*—A motion addressed to a special finding, either to make more specific or to strike out, etc., is not authorized by any rule of practice, the remedy for any such defects being by motion for new trial. *Tewksbury* v. *Howard*, *103*

4. *Failure to Find Fact Within the Issues and the Evidence.—When Not Ground for Reversal.—Burden of Proof.*—A failure to find a fact within the issues, which is established by the evidence, is not ground for reversal of the judgment, provided the facts essential to a recovery are found; for a failure to find upon an issue in such a case is equivalent to a finding against the party upon whom rests the burden of proof upon that issue. *Town of Fowler* v. *Linquist*, *566*

5. *Amendments, When May be Made.*—Amendments to special findings by the court may be made by the trial court during the term and before the rendition of the judgment. *Dowell* v. *Talbot Paving Co.*, *675*

SPECIAL JUDGE.

1. *Appointment.—Presumption of Regularity.*—In the absence of a showing to the contrary, it will be presumed on appeal that the trial court acted within the law in appointing a special judge. *Mayer* v. *Haggerty*, *628*

2. *Powers of.—Nunc Pro Tunc Entry.—New Trial.*—A special judge appointed to try a cause is the proper person to consider motions therein for a *nunc pro tunc* entry of judgment and for a new trial. *Ib.*

SPECIFIC PERFORMANCE.

See CONTRACT, 1; PARTIES, 3.

Contract.—Conveyance of Land.—Statute of Frauds.—Part Performance.—Parties.—Consideration.—A entered into a written contract with B to convey to him certain land, and subsequently B executed a written contract to convey certain described parts of said land to C, in the event of a conveyance to him (B) under the terms of the first mentioned contract. By parol agreement of all the parties to the first two contracts and D, the first named tract (the tract to be conveyed from A to B) was to be conveyed to D, who was to perform the stipulation of said two contracts as to B. A conveyed the said land to D, but D refused to comply with the terms of the contract by which the conveyance to C was to be made. C brought suit against D for specific performance.

Held, that, as between B and C, the two written contracts entered into and formed the basis, as one, of the transactions.

Held, also, that as between B and C, there was a full performance on the part of B and his obligor, A.

Held, also, that the suit for specific performance was not barred by the statute of frauds.

Held, also, that C was a proper party to enforce performance by D.

Held, also, that the receiving of valuable consideration by D from B for assuming the performance, is sufficient consideration to support the promise of D. *Boruff* v. *Hudson*, *280*

STATE BOARD OF TAX COMMISSIONERS.

See TAXES, 1, 3.

STATUTE.

See TAXES, 14; TOWNSHIP TRUSTEE, 2, 6.

STATUTE CONSTRUED.

See COMMON SCHOOLS, 2, 3; CONSTITUTIONAL LAW, 2; ELECTION, 5; GRAVEL ROAD, 1.

1. *Street Improvements. — Contractor. — Lien. — Foreclosure.* — The amended seventh section of the act of 1889, as amended by the act of 1891, conferring the rights on the contractor for street improvements to foreclose his lien, and to recover a reasonable attorney's fee, did not impair any vested right or constitutional guaranty. It simply provided a remedy for the enforcement of a right which had already been created by the act of 1889, in conferring a lien on the contractor.

Dowell v. *Talbot Paving Co.*, *675*

2. *When Statute Retrospective.—Remedial Statute.—Street Improvements.—Act of 1891.*—The statute conferring such rights on the contractor being a remedial statute relating to the mode of procedure in the enforcement of a right, is retrospective, and applies to causes of action subsisting at the date of its passage. *Ib.*

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS.

Guardian and Ward.—Constructive Trust.—Action to Enforce.—An action to enforce a constructive trust growing out of a fiduciary relation (guardian and ward), the act (the claim of adverse title) complained of being poisonous in its consequences, the suit can only be barred by the fifteen years' statute of limitations, which would begin to run when the guardian was discharged from his trust and began to claim title absolute in himself adversely to the trust. *Taylor* v. *Calvert*, *67*

STATUTE, REMEDIAL.

See STATUTE CONSTRUED, 2.

STATUTE, RETROSPECTIVE.

See STATUTE CONSTRUED, 2.

STATUTORY CONSTRUCTION.

See TAXES, 10.

STREET RAILWAY.

See MUNICIPAL CORPORATION, 9.

STREETS AND ALLEYS.

See HIGHWAY, 2, 4, 5; MUNICIPAL CORPORATION, 9, 10, 11, 12; STATUTE CONSTRUED, 1, 2.

1. *Mode of Improvement can not be Controlled by Mandamus.—Incorporated Town.*—The board of trustees of an incorporated town have exclusive power over the streets and alleys of the town, with power to improve the same, and the manner of improvement being discretionary with the board of trustees, their discretion as to the mode of improvement can not be controlled by mandamus. *State, ex rel.*, v. *Miles*, *692*

2. *Incorporated Town.—Power of Board of Trustees to Change Grade of Sidewalk.*—The board of trustees of an incorporated town has the right to change the grade of a sidewalk at any time before the

work is completed, in such manner as in their judgment would make the walk most beneficial to the public. *Ib.*

STRICT FORECLOSURE.

See MORTGAGE, 2.

SUBROGATION.

See DECEDENTS' ESTATES.

SUI JURIS.

See NEGLIGENCE, 1.

SUPREME COURT PRACTICE.

See APPEAL, 2; CONSTITUTIONAL LAW, 1; JUDGMENT, 1, 5; NEW TRIAL, 3, 8; SPECIAL FINDING, 2; VERDICT, 1.

1. *Waiver.—Failure to Argue Question.*—Questions not argued in the appellate tribunal will be deemed waived.

   Heltonville Mfg. Co. v. *Fields, 58*

2. *Questions Depending on the Evidence.—Evidence not in Record.*—No question depending wholly on the evidence can be considered when the evidence is not in the record.

   Downey v. *Head, 503*

3. *Rule where Same Question Presented by Pleadings and Special Findings.*—Rulings upon pleadings will not be considered on appeal where the same questions are presented by exceptions to conclusions of law upon a special finding of facts.

   Scanlin v. *Stewart, 574*

4. *Assessment of Damages.—Weight of Evidence.*—The Supreme Court can not pass upon the sufficiency or insufficiency of the damages assessed where to do so would require it to weigh conflicting evidence. *Radican* v. *Buckley, 582*

5. *Verdict.—Judgment Upon.—Reversal with Mandate to Enter.*—Where, after a general verdict for a plaintiff, the trial court gives judgment for the defendant upon answers to interrogatories, the Supreme Court, on appeal by the plaintiff, if it finds such answers entitle the plaintiff to judgment will not order a new trial, but will remand the case with instructions to render judgment upon the verdict. *Brown* v. *Ohio, etc., R. W. Co., 648*

6. *Ground for New Trial can not be Made Independent Assignment of Error.*—No question is saved to the admission of affidavit in evidence over objection, where such alleged error was not made a ground of motion for a new trial.

   Indiana Improvement Co. v. *Wagner, 658*

SURETY OF THE PEACE.

1. *Sufficiency of Affidavit.—Fear of Personal Injury.*—An affidavit for surety of the peace, of the following tenor, is sufficient: A, being duly sworn, on his oath says that he has just cause to fear, and does fear, that B will kill and murder him, and that he makes this affidavit only to secure the protection of the law, and not from anger or malice. *Davis* v. *State, 11*

2. *Affidavit Sworn to Before Notary Public.*—An affidavit for surety of the peace may be sworn to before a notary public. *Ib.*

3. *A Criminal Action.—Nature of.—Preponderance of Evidence.*—While a prosecution for surety of the peace is a criminal action, yet it is simply for the prevention of crime, the only question to be decided being whether the prosecuting witness has just cause

to entertain the fears expressed in his affidavit, which is to be decided by the preponderance of the evidence. *Ib.*

4. *Reasonable Doubt.—Province of Jury.*—The doctrine of reasonable doubt has no place in such an action, nor is the jury the judge of the law. *Ib.*

5. *Procedure.—Failure of Defendant to Testify.—Instruction to Jury.*—In such case, the following instruction was correctly refused: "This case is governed by the law governing criminal cases, except where the law provides otherwise. If the defendant did not testify in his own behalf, you can not take this fact into consideration, nor talk about it in the jury room." *Ib.*

6. *Evidence of Communication of Threats.*—It was not error to permit the complaining witness to testify that certain persons told him, in the absence of the defendant, that the defendant threatened to kill him and to do him other injuries, where the evidence is not in the record; for it must be presumed that the threats were also proved. *Ib.*

7. *Misconduct of Counsel.—Argument to Jury.*—Where, in his argument to the jury, the State's attorney said the following: "Gentlemen of the jury—The defendant did not go on the witness stand and testify in this case. He knew we had his neighbors in the court, and that we would impeach him if he did testify." Also, "If * * the complaining witness did swear to a lie, as Mr. ——— says he did, why did the defendant not call his neighbors, who are here in court?" And, also, "We have an illustration of permitting cranks to run at large, in the killing of Carter Harrison, the mayor of Chicago, the most outrageous murder of our time. Had the murderer been placed under bonds, that murder would not have occurred." Such remarks were beyond the bounds of legitimate argument, and being sanctioned by the court, amount to reversible error. *Ib.*

SURETYSHIP.

See MARRIED WOMAN.

TAXES.

See PARTIES, 1, 2; PLEADING, 5; TOWNSHIP TRUSTEE, 3, 4, 5.

1. *State Board of Tax Commissioners.—Jurisdiction.—Original and Appellate.*—The provisions of the statute conferring upon the State Board of Tax Commissioners the powers possessed by the county boards of review were intended to confer such powers in cases where it had jurisdiction, either original or appellate, and was not intended to confer original jurisdiction over all property in the State. *Jones, Treas.*, v. *Rushville Nat'l Bank, 87*

2. *Illegal.—Action to Enjoin.—Bank.*—The fact that bank stock may be owned by private individuals, furnishes no reason why a suit may not be maintained by the bank to enjoin the collection of illegal taxes assessed against it. *Ib.*

3. *State Board of Tax Commissioners.—Original Jurisdiction.—Extent of Authority to Order Addition.*—The State Board of Tax Commissioners has no original jurisdiction to revise individual tax lists other than railroad property and the equalization of assessments of real estate; and not having the power themselves, they can not order an addition to be made by the county auditor. *Cummings, Treas.*, v. *Stark, 94*

4. *Addition to Assessment by County Auditor.—Notice.*—The county auditor has no power to add to an assessment without giving the property owner written notice of his intention so to do. *Ib.*

5. *Omitted Property.—Power of City Clerk to Assess.*—The city clerk is the proper city officer to assess omitted property, and to give the notice to the owner required to be given in such case by the county auditor. *City of Delphi* v. *Bowen, Admr., 235*

6. *Trustee.—Estoppel.—Personal Liability.—Irregular Levy.—Special Finding.—Conclusion of Law.*—A trustee who retains from money which it is his duty to pay to his beneficiary the amount of taxes which he represents is due upon the trust fund, is so far primarily chargeable with the taxes, and is estopped to deny that they were regularly levied, but a conclusion of law holding him personally liable for other unpaid taxes which the special finding does not show that he withheld upon settling with *cestui que trust* is erroneous. *Thiebaud, Tr.*, v. *Tait, Treas., 238*

7. *Injunction.—Payment or Tender of Amount Due.*—Where a part of the taxes sought to be collected are due, a suit to enjoin the collection will not lie unless there is a payment of, or an offer to pay, the amount for which the plaintiff is liable. *Ib.*

8. *Omitted Property.—Power of County Auditor to Assess.—Information.*—In making assessment of omitted property, the county auditor may act upon any information, written or oral, or even upon his own belief. *Reynolds, Aud.*, v. *Bowen, Admr., 434*

9. *Omitted Property.—Notice.—Description.*—The notice of intention to assess, by the auditor, need describe the property only in general terms. *Ib.*

10. *Taxing Statutes Liberally Construed.*—The power to assess is a summary one, and to secure uniform and just taxation, and to protect the revenues of the State, and in the interests of honest taxpayers, it is necessary that assessment statutes should be liberally interpreted in aid of the taxing power. *Ib.*

11. *Suit to Cancel Taxes Levied on Omitted Property.—Insufficiency of Complaint.—Failure to Come into Equity with Clean Hands.*—Where an administrator brings suit to cancel certain taxes assessed against omitted property of his decedent, by the county auditor, the administrator must show, in his complaint, that he has done equity, before he is entitled to equitable relief; and where the administrator makes no pretense that the original assessment was a fair or just one, or that the decedent had, in fact, given in all his property for taxation, the complaint is insufficient on demurrer for want of facts. *Ib.*

12. *Omitted Property.—When Notice Should be Served on Administrator.*—The personal representative of a decedent is the proper person to receive notice of intention to assess omitted property from the assessment of his decedent. *Ib.*

13. *When Irregularities do not Affect Assessment.*—Irregularities do not affect the correctness of a tax assessment, if the proceedings are substantially correct, and the assessment is fair and just. *Ib.*

14. *Omitted Property.—Right of County Auditor to Assess.—Reënactment of Old Section (1881) in New Statute (1891).—Effect.*—That section of the tax law of 1881 authorizing the assessment of omitted property by the auditor, was reënacted, *verbatim*, in the tax law of 1891; and the reënactment of such section in the new law has the effect to keep such section of the old law in force without interruption, even though the old law was expressly repealed. *Ib.*

TENDER.

See CONVEYANCE, 1; TAXES, 7.

When Available as a Defense.—To make a tender of any avail, it is

generally necessary to keep it alive for the use of the party to whom it is made. *Copeland, Exr.*, v. *Summers, 219*

THEORY.

See PLEADING, 4, 6, 7.

TITLE.

See COLOR OF TITLE; COMMON SCHOOLS, 4; CONTRACT, 4; DEED, 1; EJECTMENT; TRUST, 3.

1. *By Adverse Possession.—A Marketable One.—Quieting Title.*—Title by adverse possession is as high as any known to the law, and is a marketable title, and a decree quieting the title is only a confirmation of the title so held. *Tewksbury* v. *Howard, 103*
2. *Color of Title.—Adverse Possession.*—Where there is no color of title there can be no constructive possession, and consequently no ripening of title into ownership.

Silver Creek, etc., v. *Union Lime, etc., Co., 297*

TOWN, INCORPORATED.

See ELECTION, 5; EVIDENCE, 4, 6, 7; HIGHWAY, 2; MUNICIPAL CORPORATION, 13; STREETS AND ALLEYS, 1, 2.

TOWNSHIP TRUSTEE.

See COMMON SCHOOLS, 1, 3; PARTIES, 5; SCHOOL TOWNSHIP, 3.

1. *Insurer of Public Funds.—Deposit.—Failure of Bank.*—A township trustee is an insurer of the safety of the public funds in his charge, and is bound to account for money lost by the failure of a bank in which the funds are deposited, even though he be without fault. *McClelland, Tr.*, v. *State, ex rel., 321*
2. *Statute.—Public and Private.—For Relief of Trustee.—Constitutional Law.*—An act of the Legislature providing for the reimbursement by a township of a trustee who lost public funds by the failure of a bank, and which is not declared to be a private statute, is under section 27, article 4 of the constitution, a public law. *Ib.*
3. *Taxation.—Private Use.*—A public statute which is intended to, and in effect does, so tax an individual as to take private property for private use is not valid. *Ib.*
4. *Taxation for Relief of Trustee.—Reimbursement of Fund by Trustee.*—Where a township trustee makes up from his private means school funds of the township lost by the failure of a bank in which they were deposited, he has no legal right to a return of the money so paid by him, and a statute for his relief directing his successor in the trust to repay such money, to do which it is necessary to levy a tax upon the people of the township, is unconstitutional. *Ib.*
5. *State School Funds.—Loss by Bank Failure.—Taxpayers of Township not Liable.*—Where State school funds, coming into the hands of a township trustee for common school purposes, and not raised by taxation upon the township, are lost by the failure of a bank in which the trustee has deposited them, the Legislature has no power to impose upon the taxpayers of such township the burden of making good the loss. *Ib.*
6. *Act to Relieve from Judgment.—Impairment of Obligation of Contract.—Relief of Public Officer.*—A legislative act seeking to release a township trustee and his bondsmen from liability on a judgment rendered against them on account of public funds lost in a failing bank, is void under section 24 of the Bill of Rights, as impairing

the obligation of a contract, and for the additional reason that the Legislature has no power to reimburse a public officer for money lost by him in his official capacity. *Ib.*

TRIAL BY JURY.

See WILL, 3.

TRUST.

See GUARDIAN AND WARD, 2; STATUTE OF LIMITATIONS.

1. *Conveyance.—Real Estate.—Contract.*—Where A conveyed to B certain land, and took from B an obligation to pay to C *et al.* certain sums named therein, B was thereby made a trustee for C *et al.* *Copeland, Exr.*, v. *Summers*, *219*

2. *When can not be Altered.*—And the trust being once created and accepted, it can not be altered, either by the donor or trustee, without the consent of the beneficiary. *Ib.*

3. *Title.—Grantor and Grantee.*—In such case, on the delivery of the obligation, the title vested in the grantee. *Ib.*

4. *Husband and Wife.—Personal Property.*—A husband who receives from his wife a deposit of money belonging to her separate estate, and uses it for his own purposes, becomes charged as trustee of the money, and his heirs are liable to account to the wife. *Toney* v. *Wendling*, *228*

5. *Resulting Trust in Land.—When it Does Not Arise.*—To create a resulting trust in land, under the second clause of section 2976, R. S. 1881, in favor of a wife by reason of the use by the husband, in part payment for the land, of money held by him as her trustee, it must appear that the money was delivered by the wife prior to the purchase, and under a contract by the husband to return the identical money when requested. *Ib.*

TRUSTEE.

See TAXES, 6.

VARIANCE.

Complaint and Proof.—When Immaterial.—A variance between the complaint and the evidence is immaterial where the complaint might have been amended so as to cure it, after the evidence was all in; and such amendment will be presumed. *Taylor* v. *Calvert*, *67*

VENDOR AND VENDEE.

See GRAVEL ROAD, 4.

VENIRE DE NOVO.

When Should Not Be Granted.—Informal Verdict.—A *venire de novo* should not be granted where the verdict is merely informal, but the court can understand it and render judgment thereon. *Purner* v. *Koontz*, *252*

VERDICT.

See MASTER AND SERVANT, 6; SUPREME COURT PRACTICE, 5.

1. *Sufficiency of Evidence.—Supreme Court Practice.—Criminal Law.—Murder.—Weight of Evidence.*—Where, in a criminal action (for murder), the evidence is conflicting as to the guilt or innocence of the accused, the appellate tribunal will not pass upon the weight of the evidence. *Robinson* v. *State*, *499*

2. *General.—When Prevails Against Answers to Interrogatories.*—A

general verdict will prevail against answers to interrogatories, unless the latter, being themselves free from conflict, are in absolute conflict with the verdict.
Board, etc., v. *Wagner, Admr.*, *609*

VERIFICATION.
See PLEADING, 10.

WAIVER.
See DEMURRER; ESTOPPEL; JUDGMENT, 2; SUPREME COURT PRACTICE, 1.

Filing Amended Paragraph After Demurrer Sustained to Original.—Practice.—The filing of an amended paragraph of answer after the sustaining of a demurrer to the original paragraph, amounts to a waiver of the ruling on demurrer. *Wood* v. *Hughes*, *179*

WATERCOURSE.

1. *Definition.*—A watercourse, in its most general sense, is a course or channel in which water flows. In its legal sense, it consists of bed, banks and water, a living stream, that is, a permanent or continuous stream, confined in a channel, but not necessarily flowing all the time, as the question does not depend upon the length of time water flows as compared with the time the channel is dry. *Board, etc.*, v. *Wagner, Admr.*, *609*
2. *Instructions Defining Watercourse.*—For instructions defining a watercourse held to have been properly given, and for instructions held to have been properly refused, see opinion. *Ib.*

WATERWORKS COMPANY.

1. *Appropriation of Land.—Water Privileges.—New Appraisement.—Exceptions to, Duty of Court to Hear.*—A new appraisement in a proceeding by a waterworks company, to appropriate to its use real estate and water privileges, is made in the same manner as the first appraisement; and where exceptions are duly filed to the new appraisement, it is reversible error for the court to refuse to hear the exceptions. *Werley* v. *Huntington Waterworks Co.*, *148*
2. *Appraisement.—Exceptions.—Duty of Court to Hear.*—Where exceptions are duly filed to an appraisement, the court must first determine whether right and justice require a new assessment, if that question is properly raised by the exceptions. *Ib.*

WILL.
See CONTRACT, 4; PLEADING, 10.

1. *Construction of.—Real Estate.—Expectancy.—Conditional Fee.—Defeasible Interest.*—S. died testate in 1871, leaving his widow, a son and two daughters as his only heirs at law. The will provided as follows: "*Item third.*—It is my will, after the payments aforesaid are made, and after expenses of administration are all paid, that my wife, * * if she shall survive me, and remain my widow, shall have the use of all the remainder of my estate, both real and personal, during her lifetime, * * to be kept and used by her during * * her natural life, if she so long remain my widow; but in case of her marriage after my decease, this provision of my will to be void, * * and, in that case, I desire that she take out of my estate, * * only such provision as the laws of the State of Indiana make for widows at the time of my death. *Item four.*—At the death of my wife, if she shall not marry again, I bequeath all my property, share and share alike, to my children * * *. In case my wife should again marry, and so take the provision herein made for her, * * I

bequeath the remainder of my estate * * to my children, * * as provided in the former part of this will."

Held, that the children of S. took a conditional fee in expectancy, which was to ripen into an absolute fee at the death of the widow.

Held, also, that the son having died prior to the widow, who is still unmarried, his estate was a defeasible one, which was thereby defeated, and there remains no interest which can be subjected to the payment of the son's debts.

Corey, Exr., v. *Springer*, *506*

2. *Distribution to Children at Death of Widow.*—Where there is an expressed or fairly implied intention to fix the time for distribution of the testator's estate to his children, "at the death of his widow," the law will uphold his purpose and intention. *Ib.*

3. *Lost.—Action to Establish.—Not Triable by Jury.*—In probate matters, it is only where the statute expressly gives the right of trial by jury, that such right may be demanded. Such a right does not exist in an action to establish a lost will.

Wright, Admx., v. *Fultz*, *594*

END OF VOLUME 138.

HARVAR RY